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MEMOIR OF THEOPHILUS PARSONS.

The first thought which occurs to the reader of Professor Parsons' biography of his father, is a regret that it had not been written forty years earlier, while the incidents of the active and important life which it commemorates were yet fresh in the minds of the many pupils, admirers and friends of the great Chief Justice. But though many interesting anecdotes of the individual, and graphic illustrations of contemporary manners may be lost by the inevitable lapse of time, enough has been gathered by filial industry to form a permanent and most agreeable record of the subject.

Lawyers throughout the country are well aware of the important position which Chief Justice Parsons holds as a jurist. His decisions recorded in the early volumes of the Massachusetts Reports, have raised a lasting monument to his own fame, while forming a solid basis for the work of his successors; and it is not too much to say that, but for his comparatively early death, the impression of his mind upon the jurisprudence of the country would not have been second to that of any judge who has ever adorned its bench.

It cannot surprise such readers to be informed that the vigorous powers which made themselves felt so deeply in their chosen sphere of action, were fitted to conquer other domains of science or to guide the affairs of public life.

But it is interesting to know to what extent the sound advice, the keen suggestions, and the practical sense of the judge, were availed of by his friends in various departments of action and of study. This biography reminds us of many persons, and informs us also of the part which Parsons took in shaping the Constitution of Massachusetts, and therefore, indirectly, in forming those of some other of the States, as well as of the Union. In this great crisis of our civic affairs, as important in its consequences as that of the struggle which was still in progress with Great Britain, the aid of all the most sound, patriotic and thoughtful citizens was needed and was given; and of all the contributions to this great work, that of Parsons stands among the very first in importance.

The devotion of his life, however, was given to his profession. He began practice at Falmouth, now Portland, which was soon after destroyed by the British; and he returned to his father's house in Byfield, thoroughly discouraged by what proved to be the most fortunate event of his professional life. For Judge Edmund Trowbridge who had then recently left the bench, and who was the most learned lawyer of his day in New England, was avoiding Whigs and small pox in the parsonage or paternal mansion of the young lawyer. The old lawyer at once sent to Cambridge for his valuable library, and devoted himself with ardor to directing, aiding and encouraging the studies of his young companion, whose merit and industry immediately engaged his sympathy.

Under such guidance, Mr. Parsons made such use of the enforced leisure of the early war time that his studies, not only in their general effect, but in many of their details of new and doubtful points, were of marked value to him in after life. Fearing that he might not always have access to so valuable a library, he made thorough abstracts of the precious volumes; and of these enough remain to this day, says his biographer, to fill volumes. They always accompanied the judge in his circuits, and were of great use to him in forming his opinions.

"I have heard," says the professor, "very many anecdotes of the advantages he gained from this method and completeness of study." One refers to a case tried at Hartford, in which Mr. Parsons was engaged against Alexander Hamilton. "After the trial he dined at Mr. Wadsworth's,

who had invited the leading members of the court and bar, then in Hartford. At dinner, Hamilton said, 'Mr. Parsons, pray let me ask you one thing. The point I made,' (describing it,) 'was suggested to me only after much study of the case, and then only by accident, but I thought it very strong. You were fully prepared for it, and gathered and exhibited the authorities at once, and prevailed, and I must submit; but I was a good deal surprised at it; and what I want to know is whether you had anticipated that point?' 'Not in the least,' was the answer; 'but so long ago as when I was studying with Judge Trowbridge, the question was suggested to me, and I made a brief of the authorities which I happened to have brought here with me, and found the books in Judge Ellsworth's library.' "

Another is reported in the words of the Chief Justice himself: —

" While I was studying in Byfield, Judge Trowbridge said to me, that he thought the practice of the English common law courts in requiring the proof of a will devising real estate whenever it was to be used in those courts in support of title, should not be held as applicable here, because from the nature and practice of our courts of probate, and their relation to other courts, the original proof, in probate, ought to be sufficient and conclusive; and if the will were subsequently wanted as evidence in another court, a mere record of the judgment and decree of probate should be enough, and, indeed, all that could there be received, because those inquiries which precede probate belong here exclusively to a court of probate. Accordingly, I examined this question, and made my brief, and filed it away. About the first case I had in court presented this question. I was only junior counsel, and my senior was one of the leading lawyers of the day. We needed to use a will which had received probate; but the witnesses by whom we could prove it anew, in the English fashion, were unexpectedly absent. I suggested to my senior that this new proof was unnecessary. 'Nonsense,' said he, 'I shall make no such point as that.' 'May I then?' said I. 'Yes, but on your own responsibility.' I made the point. The court said the practice was uniformly against me, here as well as in England; — they had no doubt about it; but if I wished to be heard in support of my new views, they would hear me. Whereupon I argued from my brief, and just as well as if

I had had a month of preparation. I satisfied the court, and gained a most undeserved reputation for marvellous readiness and universal knowledge.'" p. 139.

Of his method at the bar, his biographer cannot speak from personal recollection. Our readers will remember the admirable sketch of his character and appearance made by Mr. Webster, when a student in Boston, and which we printed two or three years since. In the volume before us we find some other sketches and anecdotes.

"Chief Justice Isaac Parker often spoke of the first case in which he ever saw him, and heartily would he laugh about it. Parker was living in Maine, and either a student or very young in his profession. My father, then also a young man, had been sent for in some important case. He was quite unknown to all persons outside the bar, and not well known even to the lawyers. Parker had only heard of him as a rising man. When his turn came to argue the case, he put one foot on his chair, and with an elbow on his knee, leaned over, and began to talk about the case as a man might talk to his neighbor by his fireside. 'Pretty soon,' said Parker, 'I thought I understood him. He was winding the jury about his fingers. He made no show; he treated the case as if it were a simple affair, of which the conclusion was obvious and inevitable; and he did not talk long. He got a verdict at once; and after the jury were dismissed, one of them whom I happened to know, came to me and said, 'Who is this Mr. Parsons? He is not much of a lawyer, and don't talk or look as if he ever would be one; but he seems to be a real good sort of a man.'" p. 143.

Mr. Parsons would have felt no inconvenience from the "hour rule," which confines the eloquence of our bar. He is said never to have taken more time than that in any cause, and he would dispose of nearly all in much less. This is true of some of the best advocates of our time, but of very few; and the modern practice has extended trials to such length, that there are many cases in which nothing like a thorough summary of the evidence, on either side, however brief, can be made in sixty minutes.

Upon this same matter of his appearance at the bar, we have one other personal reminiscence, presented to us in a letter from the Hon. William Baylies. p. 166.

"I heard him several times, at Plymouth, address a jury; but of his manner, and style of argument, I cannot speak

so distinctly and particularly as I could wish; for, after the lapse of more than half a century, the vivid impression made upon me at the time of hearing him has partially faded from my mind. It appeared to me, however, as far as I can now recollect, that his style and manner were well suited to the solid, philosophical, and logical character of his mind. They were plain, natural, and without a particle of affectation. There was no attempt at display, no parade, no note of preparation; nothing of the theatrical or the rhetorical. In one word, there was no bluster. Cool, collected and self-possessed, never surprised or embarrassed, he proceeded at once to lay before the jury the great and leading points of the case, and paid little or no attention to the minor points. He spoke with facility, but not with that rapidity of utterance which sometimes confuses not only the hearer, but the speaker himself. His language was clear, simple, and perfectly adapted to the subject of which he was treating, and easily understood by any person of ordinary intelligence. Though he omitted nothing important to the strength of his argument, he never was redundant, and might properly be called a concise speaker. He had the power of condensation, which, as the late Col. Pickering once remarked to me, was a rare and great talent, and further said, that among the few he had ever known to possess it was Theophilus Parsons. His manner, though not vehement, was earnest and energetic. He used but little gesture; and his voice, though not loud, was pleasant and persuasive. He spoke like one anxious to get at the truth; and if the power of convincing by strong and forcible argument may, with propriety, be denominated eloquence, he possessed as much of that faculty as any one I ever heard. He never was oppressed by the magnitude of the case in which he appeared; however difficult or perplexed or complicated it might be, he would, whether addressing the court or the jury, 'the Gordian knot of it unloose familiar as his garter.'"

Of the judicial career of Judge Parsons, we need not say much; its results are well known and appreciated by all lawyers. That part of his course which at the time excited much ill feeling among the lawyers, and some of the suitors, we mean his practice of shortening trials by refusing to let what he thought clear cases be argued to the jury, can never be imitated, and need not now be discussed. It is pleasantly pictured in the anecdotes preserved by his son.

"The anecdotes which were told of him in this respect are innumerable. Let me select a few which I suppose to be perfectly authenticated, and sufficient to illustrate the way in which things went on. Mr. Dexter was more disturbed by my father's course than, perhaps, any other lawyer; not because he was diffuse or tedious, for his style of speaking was compactness itself; but because he was more employed than any other man in difficult cases, or in that larger class of cases which call on the advocate to make up by his own power for some little want on their part of law or evidence. One day when my father stopped him in an argument, on the ground that he was trying to persuade the jury of that for which there was no evidence, he replied, 'Your Honor did not argue your own cases in the way you require us to.' 'Certainly not,' was the reply; 'but that was the judge's fault, not mine.'"

"In the trial of a cause in Boston, Mr. Otis had offered some testimony which my father ruled out. Mr. Otis submitted, but in his argument was beginning some allusion to it, when my father said, 'Brother Otis, that will not do; you know that evidence was ruled out.' But it was very important, and perhaps Mr. Otis thought he ought to have had the benefit of it; at all events, he pretty soon referred to it again. Then my father said, 'Mr. Otis, please understand and remember that fact is not in the case, and not to be brought in thus indirectly.' Mr. Otis again submitted and apologized; but, before long, again ventured on an allusion to it. 'Sit down, Mr. Otis, sit down, sir,' was the somewhat stern command; and without permitting him to say anything more, my father arose and charged the jury."

And there are several more of like tenor, besides these, which all the old members of the bar can tell. The lawyers were very angry, and sometimes with cause; but the substantial good which was effected, in clearing the dockets, and the immense personal influence of the judge carried him through; and the grumblers were silenced.

Professor Parsons, whose powers of telling a good story are well known, and whose skilful pen has been practised on many and widely diverse subjects, has exerted all his skill and power to make of his slender materials, a most hearty, agreeable, and interesting book. It has already been read by thousands of those to whom, before, Chief Justice Parsons was only the shadow of a great name; and it will be accepted, if we mistake not, as a valuable and permanent addition to our literature.

HOPKINS *v.* WARD, — AN ANTE-REVOLUTIONARY LAWSUIT.

Among the names of the signers of the Declaration of American Independence, is that of Stephen Hopkins, of Rhode Island, written apparently with a trembling hand, the result of physical infirmity, not of any want of resolute determination in this defiance of the authority of King and Parliament. Undoubtedly he was one of the most distinguished and intrepid of New England patriots; early in his avowal of the right of the Colonies to govern themselves without the interference of the mother country; unwavering in his devotion to the cause of American Independence.

Few men have ever been more in public life. Commencing business as a farmer on lands given him by his father and grandfather, he held, from the year 1731, when he was chosen Town Clerk of Scituate, his place of birth, the various offices of Town Clerk, President of the Town Council, Clerk of the Courts and Proprietors' Clerk for the County, Representative to the General Court, Justice of the Court of Common Pleas, and Chief Justice of that Court, Speaker of the Assembly, Chief Justice of the Superior Court, Representative in Congress, and Governor of the Colony of Rhode Island. From 1731 till his death in 1785 he was hardly ever out of public office.

No incident in the life of such a man, which can tend to throw light on his public relations or private character, can be wholly devoid of interest. And the following may serve in some measure to illustrate both of these.

The fact that for a long period Gov. Hopkins was engaged in an active and acrimonious political contest, in which his chief opponent was the Hon. Samuel Ward, afterwards himself Governor, is familiar to all students of New England history. The further fact, that out of this contest arose, in some manner, an action for libel, in which Gov. Hopkins was plaintiff and Mr. Ward defendant, is known to many. But it is conceived that the particulars of this controversy at law, the evidence, and the result, are understood by few. The pamphlet issued by Gov. Hopkins, and the published reply by Mr. Ward, which was the foundation of Hopkins's action, are now very rare. Among the files in the office of the Clerk of the Courts for the County of Wor-

cester, Massachusetts, may be found the papers in this suit, which, though both of the parties lived in the Colony of Rhode Island and Providence Plantations, was, by the aid of a fiction of law, brought in the County of Worcester. To the courtesy of the Clerk for that County we are indebted for the privilege of inspecting these papers, and attempting to prepare a history of this case.

Before commencing a statement of the case, it will be well to glance a moment at the history of the events which called forth the pamphlet of Mr. Ward.

Early in 1756, no declaration of war having yet been made by England against France, though a series of spoliations had been carried on for a considerable time by the English navy upon the commerce of the French, and by the French and Indian torch and tomahawk upon the English colonists, Shirley, the worn-out barrister, who had been appointed by the Newcastle ministry to the command of the American forces, was superseded and ordered to return to England. The Earl of Loudon was appointed Commander in Chief of the army throughout the continental provinces in America, and governor of the Ancient Dominion of Virginia. In May, England promulgated her formal declaration of war. In June, Abercrombie, Loudon's second in command, arrived at New York and proceeded to Albany. He refused to appoint Washington, who was urged by Gov. Dinwiddie for a command in the army; refused to listen to the counsel of Shirley, to send two battalions forward for the protection of Oswego, and passed the remainder of June and July in idleness. July 29th, Loudon came and joined the camp of loiterers, an army of at least ten thousand men, waiting for his orders, wasting in idleness and disease.

The French, meanwhile, were actively pressing their operations, intent on Oswego. Montcalm arrived at Quebec. By continual marching, day and night, he reached Ticonderoga. He projected the fall of Oswego. It fell August 14th, after some outside skirmishing, not waiting for the storm. Montcalm razed it to the ground.

These events roused Loudon from his lethargy, and he began to look around him. He despised the Provincials, but now their aid seemed indispensable to his safety. He issued his orders for raising Colonial forces to protect Crown Point.

He sent to Rhode Island by letter addressed to Stephen

Hopkins, then Governor, under date of August 20, 1756. In it he says:—

"In consequence of the Powers given to me by His Majesty's Commission, under the Great Seal, and of His Order, signified to you by His Secretary of State, I do demand of you an Aid of as considerable a Body of Men with Arms as you can send, to be raised in Companies, and sent off as fast as raised, and also a Number of Carriages or Ox Teams, wherewith I may be able to transport Provisions, as this Province alone is not able to supply all."

The Assembly, at their meeting on the 6th of September, voted sixty men, and also a committee of three, of which Samuel Ward was one, to draft an address to Lord Loudon, and present the same to the Assembly, and a committee of two, of which the Governor was one, to proceed to Albany, congratulate the Earl upon his safe arrival in America, lay before him the state of the Colony, and request his assistance in matters of concern to the Colony, according to instructions given them by the General Assembly. But Loudon heard nothing in reply to his letter, nor were the sixty men sent. On the 30th of September, he wrote again to Gov. Hopkins, repeating his demand, and requiring him to send the men forward with all despatch.

The Governor called together the Assembly on the 14th of October. Four hundred men were voted and raised. But on the 30th of October, Loudon wrote from Fort Edward that the aid was too tardy to be of service, and requested that the troops might be disbanded. Under date of October 31st, Hopkins wrote to Loudon, announcing the raising of the men, and setting forth the great expense the Colony had incurred in carrying out his orders. Loudon in reply, November 5th, regretted the expense to the Colony, but claimed that it arose from no fault of his. And so the forces were disbanded.

Previous to the war, the Rhode Island Assembly of 1755 had passed a law authorizing the arrest and confinement of suspected Frenchmen. Four Frenchmen, who were in jail at Newport under this act, petitioned the Assembly of 1756 for leave to depart by vessel to a neutral port, praying that meanwhile they might be allowed to go at large, and, giving bond for their good behavior, remain at some private house. The first prayer of the petition was granted, the second denied. Soon after the Assembly rose, Gov. Hop-

kins ordered them to be removed from jail, and allowed them to go to Providence, and there live at large without bondmen. Complaint was made to the Assembly. The lower House voted that the Sheriff proceed at once to Providence, apprehend the Frenchmen, bring them back to Newport, and confine them in jail. The upper House, after retaining this vote some days, returned it non-concurred in, as the Governor had promised, in committee of both Houses, that he would remand them at his own expense. This was not done, and soon after the prisoners were sent to the West Indies.

The Assembly, at their session in 1756, passed a vote allowing the committee of war two per cent. on all the money that passed through their hands, in paying the expenses of the expedition to Crown Point. In the lower House, the vote on the proposition was a tie, half that body advocating the allowance of a smaller commission. The vote was decided in favor of two per cent. by the casting-vote of the Speaker, who was himself a member of the committee. The Governor, also, who was a member, came into the House, and advocated the allowance of two per cent.

These transactions, a brief outline only of which the limits of the present article allow us to present, caused much excitement in the Colony of Rhode Island and Providence Plantations. Most prominent among the malcontents was Samuel Ward. So alarming did the aspect of affairs become, that the Governor felt called upon to issue a pamphlet to allay the growing excitement against his administration, and prepare the minds of the freemen of the Colony for the coming election. It was issued, dated Providence, March 31st, 1757. In it the Governor complains of the disposition of a class of men in the community to obstruct the execution of every measure undertaken for the public good, and find fault with any proceeding not originated by themselves. He defends the committee of war, claiming that none of them had ever charged anything for their services, but, notwithstanding all they had done and suffered, that they were willing to leave the whole question of their compensation to the Assembly. To the complaint that the raising of four hundred men was a grievous burden and expense to the Colony, which would not have been incurred save for the negligence of Hopkins to inform Lord Loudon of the first action of the Assembly, he makes answer, in general,

that heavy expenses must be expected and sustained in time of war; and, in particular, that there was no negligence on his part in answering Loudon's first letter, because, first, the Assembly had appointed a special committee for that purpose; and secondly, because, before he left the Assembly he was taken sick, and thereafter was confined to his bed, unable to write or dictate a letter, till he received the second one from the Earl. In closing, he deprecates the disposition to gratify party spirit by misrepresentations calculated to injure the administration, and says:—

"Such Practices, it seems, have prevailed on a Gentleman, many Years distinguished with remarkable Favors from his Country, until satisfied with Honors, and worn in the Public Service, he publicly and voluntarily quitted it, desiring his Constituents to provide themselves with another in his Stead, for that his Abilities could no longer permit him to serve them in that laborious station, however he has now thought fit to join in the common Cry, and suffer himself to be made Use of to throw his distressed Country into the utmost Confusion." Concluding: "It is not the Pleasure or Profit that attends the important Office I at present sustain, but my Duty to God and my Country that prevents my deserting my Post at this Time, when Difficulties of almost every kind from Abroad and at Home involve an unhappy People."

This pamphlet called forth from Samuel Ward a bitter and personal reply. It bears date, Newport, 12th April, 1757. In it he reiterates the charges made against the administration on account of the appropriations for the committee of war; reaffirms the statement that the expense of raising the four hundred men was caused by Hopkins's negligence and sloth, as it was agreed in the Assembly that the Governor should act personally in place of the committee on an address under the first vote, and this he had not done; defends Gov. Greene from the charge that he resigned the chief magistracy because he was worn out in the service, and says:—

"I shall take no further Notice of the high Encomiums upon your own Administration which take up so large a part of your Performance than just observe that those Gentlemen certainly stand in need of Applause who are forced to praise themselves, and that Administration must be very bad which none commend but those who are concerned in it.

"You conclude, sir, with saying, that 'neither the Pleasure or Profit of the Office, but your Duty to God and your Country prevent your resigning your Post.' But when a Man is seen to use every Art to gain for himself and his Family Posts of Profit and to make the most of every Employment, it is very natural to believe that such a Man is influenced by other Motives than those of Love to God and his Country. And lest I should be reproached with not having reduced my Complaints to any Certainty, you'll excuse my taking notice that your Honor is one of the Committee of War, and in that Capacity receive a large Sum from the Government — That the last Year one of your Sons was Commissary for the Troops, That another during great Part of the Campaign was employed as his Assistant at Albany, and upon his Return was sent by you to New York to bring home the Sterling Money, and though so utterly ignorant of the Business he was to transact that he never took a Bill of Lading nor Receipt of any Kind for the Money, yet was allowed double the sum that Messrs. Richards and Coddington were, who had put themselves to an extraordinary Expense for Bouys and Bouy Ropes for the Security of the Money, and let me add to all this that you have demanded and received fifty or sixty Pounds for a Letter of Marque, and demand much more for a Commission for a Privateer, when Mr. Greene during the last War was contented with five Pounds."

Upon the charge relating to the imprisoned Frenchmen, he says: —

"And here I must take the Liberty to ask you whether breaking a Promise made to both Houses of the Assembly is consistent with your Duty to God, and whether treating our inveterate Enemies in such a manner discovers any great Regard for your Country? And is not taking Men out of Jail who were put in by Law, and continued in by the legislative Power of the Colony, acting in a tyrannical and arbitrary Manner, and actually subverting the Constitution of the Government, and assuming a Power not even pretended to by any King of England since James the Second."

And finally: "Many other Instances of your Conduct might be mentioned, which are inconsistent with the public Good. But enough has been said, not only to justify, but to show the absolute Necessity of the Opposition which

has been made. I shall therefore conclude with observing, that when the Governor of a Colony has so little regard to his Character as to print absolute Falsehood, and is so fond of his Post as to stick at nothing to keep it, the world will judge what sense he has of his Duty to God and his Country."

In May came the election of Governor, and Mr. Hopkins was defeated.

The publication of the pamphlet and the result of the election combined, seem to have aroused in Hopkins the fiercest indignation. Two or three depositions which were offered or introduced in evidence at the trial of the libel suit illustrate his feelings towards Mr. Ward: —

"James Angell of Providence in the County of Providence on Solemn Oath Testifieth and Sayeth that he being at William Powel's Shop in Providence Some Time In Aprill Last and the Hon'ble Stephen Hopkins Esqr and Mr. Samuel Currie of Providence both being at said Shop began a Dispute about a pamphlet which Mr. Samuel Ward had Published against the said Hopkins, and In the Dispute Mr. Hopkins Said To Mr. Curie he Looked upon Mr. Ward No better than a Thiefe and a Robber for he had Published falsehood against him and that he would have Satisfaction of Mr. Ward. Mr. Currie Replyed, what you would not kill him for I heard that you said you would. Yes Said Mr. Hopkins, I think it would be no more of a Crime to Kill him than it would be to Kill a man that should brake my house open to Robb me for when a man's Good Name is Taken away and by Such falsehoods as Mr. Ward has published and he not to Resent it, he ought to be Treated as Mr. Ward has Treated me. then Mr. Currie asked Mr. Hopkins wether it would not be murther in him to Kill Mr. Ward. Yes Said Mr. Hopkins it would, but I Desine to Give him this offer, Either to Take a Pistle and I another, and I will blow his braines out or he mine or that he shall give me Satisfaction In Law. I Likewise was pressent at Mr. Clark's Shop in Said providence when Mr. Hopkins Said much to the same purporte to Mr. Elisha Brown. [*Deposition of James Angell, in Hopkins* v. *Ward.*]

And Mr. Currie, in his deposition, says that he asked Mr. Hopkins, when he had threatened to kill Mr. Ward, if he did not obtain the satisfaction he asked in law, if "that would not be Murther, Seeing that he would —— Time to

reflect after the Commencement of his Action. Mr. Hopkins answered Yes."

But he decided to try the law first; and on the 20th of June next after the publication of the pamphlet, commenced his libel suit upon it in the Superior Court of Common Pleas for the County of Worcester. The writ bears the *teste* of John Chandler, then Justice of that court, and the damages are laid at five thousand pounds. The declaration sets forth that "Whereas the plaintiff who is a liege subject of his present Majesty King George had lived reputably in the Colony of Rhode Island from his youth upwards, had for a course of more than twenty years been employed by the said Colony in divers offices of great trust and for the five last of said years as Chief Justice of the Superior Court throughout said Colony, and the freemen of said Colony having had so long experience of the abilities and integrity of the plaintiff did in the month of May one thousand seven hundred and fifty-five elect him the plaintiff to be Governor of said Colony in which station he did continue two years to the satisfaction of the said freemen and did again stand as a candidate for that office for the year one thousand seven hundred and fifty-seven, all which the defendant well knowing yet intending to slander and defame the plaintiff and deprive him of the good opinion of the said freemen and thereby cause him to be displaced from the office of Governor as aforesaid, did upon the twelfth day of April in the year one thousand seven hundred and fifty-seven, at a place called Newport in Worcester aforesaid, falsely and maliciously compose and cause to be printed and the day and at other days publish through the said Colony a certain false and scandalous libel of and concerning the plaintiff in the following words, to wit."

Here is set forth the pamphlet in full. It will be observed that the publication is alleged to have been at Newport in the county of Worcester. It seems that this fiction must have been adopted for the purpose of bringing the case before a jury out of the Colony of Rhode Island, where great excitement prevailed among the freemen on the subject of the late controversies.

In an action of libel for words of the character used in Ward's pamphlet, an allegation of special damage was of course necessary, and it is made as follows: "And the plaintiff saith that by reason of the many falsehoods and scan-

dalous expressions contained in the said libel composed printed and published by the defendant as aforesaid, charging the plaintiff with falsehood, want of capacity and integrity and acting arbitrarily corruptly and tyrannically in his aforesaid office of Governor, the freemen of the said Colony of Rhode Island were made to alter the aforesaid good opinion they had always heretofore had of the plaintiff and at their general election on the first Wednesday in May in the year of Our Lord one thousand seven hundred and fifty-seven although he stood as a candidate as aforesaid did refuse to elect him the plaintiff to the said office of Governor."

The defendant was arrested at Rehoboth, in Bristol county, and gave a bond to the sheriff for his appearance at court.

He did appear and made answer that Stephen Hopkins ought not to maintain his action, "because he says that the said Stephen on the last day of March last at a place called Providence in Worcester aforesaid wrote composed and published a pamphlet containing not only a very Erroneous narrative and unfair representation of some of the proceedings and transactions of the General Assembly of the Colony of Rhode Island and Providence Plantations and of some of the members thereof in public affairs, but also containing unjust aspersions on the said Assembly in general and on some of the members thereof in particular of the tenor following."

The declaration here sets forth in full Gov. Hopkins's pamphlet described above, and further says:

"And the said Samuel Ward without any malice against the said Stephen, or design to injure him and only to set the said proceedings and transactions of ye sd Gen'l Assembly and the members thereof in a more fair light, and to vindicate the said General Assembly and its members from those unjust aspersions and thereby preventing public mischief that ye composing and publishing ye same pamphlet might otherwise do did publish the said pamphlet declared on."

The answer sets up further the truth of the statements made in the defendant's pamphlet, and prays judgment whether the plaintiff ought to maintain his action.

The Replication denies the truth of the matters contained in the defendant's pamphlet, and affirms that they were pub-

lished by the defendant of his malice, and intending to injure and defame the plaintiff, and not for the cause mentioned by the defendant in his plea, and puts himself upon the country.

"And the defendant likewise."

The plaintiff's pleadings are signed by Edmund Trowbridge, distinguished in the professional annals of Massachusetts for forensic and judicial learning and ability, and Mr. John Aplin, of Rhode Island; and the defendant's by Benjamin Pratt, afterwards Chief Justice of New York. Mr. Henry Ward was also of counsel for the defendant.

The issue was thus joined, and the cause ready for the jury; but so many persons having business at the court were absent in the public services, that the judges caused the court to be adjourned to the second Tuesday of the next September.

At the adjournment in September, the case came on for trial. Of that trial, which must have excited so deep an interest at the time, from the high character of the parties, the political bearings of the contest, and the distinguished professional talent employed in it, very few particulars have survived. A portion of the evidence submitted upon the one side and the other, consisted of depositions, and they are preserved. But of the oral evidence, the arguments of counsel, and the charge of the Justices, nothing to our knowledge remains.

The facts essential to the plaintiff's case seem to have been those of the publication and special damage. No depositions remain as to the first, and it is probable that it was admitted by the defendant. Upon the second point we find the depositions of Thomas Ward, then Secretary of the Colony of Rhode Island, and Job Bennett, Jr., at that time a deputy for the town of Newport, and one of the persons appointed to read and tell the proxies and votes at the general election, in Newport, in May, 1757. By these depositions it appears, that Hopkins and Greene having been candidates for the office of Governor at that election, Hopkins was defeated by about four hundred votes.

Here the case of the plaintiff must have been rested, for want of further accessible testimony. What proof, if any, was introduced, of the falsity of Ward's charges; what, if any, of the malice which inspired him, we cannot learn from any papers now remaining.

The evidence of the defendant is strongly corroborative of the truth of the charges in his pamphlet.

Gideon Hoxie testifies as to the allegations relating to the compensation of the war committee, and his testimony is all that remains upon this point. He states that when "Some time Last winter a vote Passed the Lower house for Not allowing the Committee of War Such Large fees as two pr ct. his Honour the Governor Came into the Lower house and said Nobody Could Serve for less than Two pr ct. in that office to Do it well & and he was willing to be Dismissed from said office, and Did Not incline to Serve for Less."

Other depositions remain, sustaining the various other charges in the defendant's pamphlet — the release of the French prisoners, the transportation of the sterling money from New York, the committee to address the Earl of Loudon, the specie value of bills, and (though no such charge is made in the pamphlet) that Hopkins's excuse for not answering the first letter of the Earl of Loudon, that he was sick, and unable to attend to the duty, was wholly a feigned one. Hopkins had said in his pamphlet that after he left the Assembly he was taken sick, got home with difficulty, and was confined to his bed, unable either to write or dictate a letter from that time till he received his Lordship's second letter; but Elisha Brown deposes that he saw him a week before that letter was received, a mile from his (Hopkins's) house.

The last species of evidence in this cause, to which allusion need be made, is of peculiar historic interest, as showing at how early a day sentiments like those embodied in the Declaration of Independence were entertained and proclaimed, and vindicate the claim of Stephen Hopkins to perhaps the first place among those who denied the right of King and Parliament to rule the American Colonies. What particular relevancy these declarations had to the issue, it may be difficult at this day to determine. They may even have been introduced in mitigation of the special damages, and to show that other causes than the publicatian of Ward's pamphlet led to Hopkins's defeat at the gubernatorial election. But whatever may have been the purpose of their introduction, the biographer of Hopkins may well accept them as conclusively showing that more than twenty years before the Declaration of Independence,

public denial was made by Hopkins, then Governor of the Colony, and President of the Superior Court, of any authority in the Government of Great Britain to make law for the American Colony. The depositions are those of Col. Job Almy, and William Richmond, an associate Justice of the Superior Court. The substance of both is contained in that of Col. Almy, which is as follows:

"I, Job Almy of Tiverton in the County of Newport in the Colony of Rhode Island &c. do testify that at the Superior Court held at Newport in March A. D. 1756 I brought a Writ of Review against Joseph Scott then high Sheriff of the County of Newport for not levying an Execution according to the Tenor of it for 670 Pieces of Eight &c. . . . he insisting that Bills of Credit were a lawful Tender. At which Court the Jury gave me the Pieces of Eight agreeable to the Execution. After trying the said Case, I dined at Mr. Jonathan Nichols, Inn holder at Newport, where were present Stephen Hopkins Esqr. then Governor of this Colony and President of the said Court Wm. Richmond Esqr another of the Justices of said Court and Mr. John Aplin with some other Gentlemen. And as in Conversation I was blaming Mr. Aplin [who was my Attorney] for not insisting on the late Act of Parliament wherein it is expressly declared, that no Bills of public Credit should be a lawful Tender for any Money-Debt, the said Stephen Hopkins with some warmth reply'd What have the King and Parliament to do with making a Law or Laws to govern us by, any more than the Mohawks have? And if the Mohawks should make a law or laws to govern us we were as much obliged to obey them as any Law or Laws the King and Parliament could make. I was somewhat surprised to hear him express himself in such a Manner and after a short Pause told him I believed it would be difficult for him to find a Man who would go Home and tell the King and Parliament such a Story. At the same time the said Stephen Hopkins further said That as our Forefathers came from Leyden, and were no Charge to England, the States of Holland had as good a Right to claim us as England had."

It only remains to state the result of the trial. The jury found for the defendant: costs of suit and judgment were entered accordingly.

From this judgment the plaintiff appealed to the Superior

Court of Judicature, and entered into recognizance to prosecute his appeal with effect.

In the records of that court at Boston is found the concluding chapter of this history:

"Stephen Hopkins Esqr Appell't *vs.* Samuel Ward Esqr Appellee.

"The plaintiff by his attorney prayed leave to discontinue this suit he being unprepared for trial. Granted. It is therefore considered by the Court that the said Samuel Ward recover against the said Stephen Hopkins costs taxed at £22. 13. 9."

For which sum execution issued Sept. 13, 1760.

United States Circuit Court, District of Massachusetts. October Term, 1858.

ROGERS, *Qui tam v.* JEWETT AND AL.

The statute penalty imposed by section sixth of the copyright act of 1831 (4 Sts. at Large, 437), is not incurred by printing and publishing so much of a book as to amount to an infringement of its copyright.

The words "any copy," in that section, must be construed to mean a transcript of the entire work.

CURTIS, J. — This is an action of debt for penalties founded on the sixth section of the copyright act of February 3, 1831. The declaration, which is demurred to, alleges, in substance, that the plaintiff, having an exclusive right to print and publish a certain book, the defendants have printed and published a book "whereof a large part is copied from said book of the plaintiff, and is an infringement of the copyright thereof."

The question raised by the demurrer is, whether the statute penalty is incurred by printing so much of a book as to amount to an infringement of its copyright.

The sixth section of the act is as follows: "That if any person or persons from and after the recording the title of any book or books according to this act shall, within the term or terms herein limited, print, publish or import, or cause to be printed, published or imported, any copy of such book or books without the consent of the person legally entitled to the copyright thereof, first had and obtained in writing, signed in presence of two or more credible

witnesses; or shall, knowing the same to be so printed or imported, publish, sell or expose to sale, or cause to be published, sold or exposed to sale, any copy of such book, without such consent in writing; then such offender shall forfeit every copy of such book to the person legally, at the time, entitled to the copyright thereof; and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported or exposed to sale contrary to the intent of this act, the one moiety thereof to such legal owner of the copyright as aforesaid, and the other to the use of the United States, to be recovered by action of debt in any court having competent jurisdiction thereof."

The question depends on the meaning of the words "shall print," &c. "any copy of such book or books."

What Lord Mansfield said in *Mellen* v. *Taylor*, 4 Burr, 2311, was the technical meaning of the word copy, viz., the incorporeal right to the sole printing and publishing, cannot have been the sense in which that word copy is here used. It means transcript; and the only doubt is whether the thing complained of must be a transcript of the entire book, or whether the penalty is incurred by printing of so much of it as amounts to an infringement of its copyright.

The words, a copy of a book, naturally import a transcript or copy of the entire book.

By the fourth section of this act, the applicant for a copyright of a book must deliver to the clerk of the District Court "a copy of the same." No one would suppose this condition complied with by a delivery of a copy of less than the entire book; and it would hardly consist with that principle which requires penal laws to be construed strictly, if I were to hold that the words, a copy of a book, meant only a copy of the entire book in the fourth section, which confers a privilege, and meant not only this, but also a copy of any such part of a book as would infringe its copyright, in the sixth section which inflicts a penalty.

To construe the act as the plaintiff claims it should be construed would be, in effect, to insert in it after the words "copy of a book" the very important addition "or any substantial and material part thereof sufficient to infringe its copyright." This enlargement of a highly penal law, so as to extend it to a large class of cases not described in it, is inconsistent with the soundest principles of interpretation.

I am not only unable to say that Congress did intend to inflict these penalties on the unlawful publication of parts of a copyrighted book, because they have failed to say so, but I think it clearly appears, from a comparison of the act of May 31, 1790, with the provisions of this act, by which it has been revised and repealed, that Congress did not intend to inflict these penalties upon the unlawful printing or publication of less than an entire book.

The second section of the act of 1790 provided for penalties for the printing, &c., of any copy or copies of any map, chart, book or books, without the consent of the proprietor. Maps, charts and books, are here all included in the same section, and subject to the same provisions.

When this act was revised, and repealed by the act of 1831, the provisions of its second section are divided and changed.

The unlawful printing of books is prohibited under penalties by this sixth section now under examination.

The unlawful making of maps, charts, engravings, prints, and musical compositions, is prohibited under other penalties, by the seventh section.

The sixth section, in describing the offence, uses the language of the act of 1791, "print," &c., "any copy of such book or books;" the seventh section materially changes this; its language is "engrave, etch or work," &c., "*either on the whole, or by varying, adding to or diminishing the main design with intent to evade the law;* or shall print," &c., "any such map," &c., "*or any parts thereof.*"

This makes it plain that, in enacting this law, Congress did intend to inflict penalties on any such piracy of the copyright of a map, chart or engraving, as would amount to an infringement of the copyright; and, so intending, that the appropriate language was used to express the intent. In the preceding section, touching books, all such language being omitted, the inference is obvious and strong, that it was not intended to include cases of copying parts of a book, but only the republication of the whole.

It is urged that this construction would render the law of little utility, because it would be easy to omit some unimportant parts, and thus escape. Whether such omission would evade this law, I am not called on to decide. If it did, literary property would be better protected than the rights of inventors; for they can only have their private

remedies at law and in equity, if their inventions are substantially copied. And authors have not only these private remedies, but they who attempt to offer to the public reprints of their works are subjected to severe penalties. Whether these penalties should be imposed on those who offer some parts of their books to the public, is for the legislature to determine.

As to maps, charts, engravings, prints, and musical compositions, the legislature has thought proper to have the penalties applied to any unlawful copy of such work made with design to evade the law. But no such intention is manifested in regard to unlawful copies of parts of books.

So far as I know, the question arising in this case has not been authoritatively decided. It was raised in the Circuit Court in the case of *Backus* v. *Gould*, 7 How. 798, and was ruled *pro forma* by the Circuit Court of New York. But the Supreme Court did not have occasion to pass upon it, that case having been decided on another ground.

C. M. Ellis, for plaintiff.

Sewall, contra.

Supreme Judicial Court of New Hampshire. Strafford, June Term, 1859.

CLAPP AND AL. *v.* ROGERS, TRUSTEE OF ROGERS.

Foreign attachment.

In a trustee suit, the plaintiff, after service of the writ upon the trustee, may attach the property of the principal defendant in the trustee's hands; but such attachment will discharge the trustee *pro tanto*.

The plaintiffs, after having caused a trustee writ to be served, attached the goods in the hands of the trustee, on account of which they sought to charge him. A previous attachment had been made by another creditor, and the plaintiffs' was made subject to that. Upon the sale of the goods by the officer, the sum realized was insufficient to pay the execution recovered in the suit upon the first attachment. *Held*, that the plaintiffs by their attachment had discharged the trustee from liability as such, on account of the goods.

PRAY *v.* GREAT FALLS, MAN. CO.

Construction of a grant.

As a general rule, the express mention of one thing in a grant, implies the exclusion of another.

Where a grantor, by his deed, conveyed the right to flow his land *below* a specified point, but no mention was made of the land above, and the grantees, at the same time, gave him a written agreement stating that they had purchased the right to flow *below*, for which they were to pay him reasonable compensation. *Held*, that the right to flow *above* the specified point was not granted.

A grantor conveyed a piece of land by metes and bounds, and then added, "containing two acres, more or less, and embraces all the mill privilege on the Rochester side of said falls." *Held*, that this was not a covenant that there was a mill privilege within the boundaries of the land, and that the term "embraces," as used in the deed, was not a term of grant.

DAME *v.* DAME AND AL.

Buildings on land of a third person.

If a house is erected by one man upon the land of another by his assent, and upon an agreement or understanding that the builder may remove it, when he pleases, it does not become a part of the real estate, but remains a personal chattel.

A recovery of the land in a real action, by the owner or his assignee, with notice, does not impair the right of the owner of the building to remove it.

STATE *v.* FREEMAN.

City ordinance.

An ordinance of the city of Dover prohibiting restaurants to be kept open after ten o'clock at night, is authorized by the charter, and is not in conflict with the constitution of the State.

ATLANTIC MUTUAL FIRE INS. CO. *v.* YOUNG.

Declaration on note given to an insurance company.

A promise contained in the deposit note given by the insured to a mutual fire insurance company upon the issuing of a policy to him, "to pay to the company or to their

treasurer," the assessments which may be ordered by the directors, is not a promise in the alternative to one of two distinct parties, but whether viewed as a promise in terms "to the company" or "to their treasurer," is, in either case, a contract with the company, for the non-performance of which the right of action exists in them alone.

Where the promise in such deposit note is set out in the declaration as a promise to pay "in such portions and at such times as the directors, agreeably to the act of incorporation and by-laws of the company may require," and the breach assigned is the non-payment of an assessment ordered by the directors, without averring that it was ordered agreeably to the act and by-laws, or without alleging the time when it was ordered to be paid, the declaration is bad on demurrer.

Cheshire. July Term, 1859.

THE ATTORNEY GENERAL *at the relation of* ABBOT AND AL. *v.* THE TOWN OF DUBLIN AND AL.

Construction of a bequest given for the benefit of a religious society.

The Rev. Edward Sprague was settled by the town of Dublin, in 1777, as the minister of the Congregational Church and Society in that town, and continued to be their settled minister until his death, in 1817. In December, 1817, he made his will, containing the following bequest: "I give to the town of Dublin the sum of five thousand dollars, to be kept at interest by said town forever, for the sole purpose of supporting the Christian religion in the Congregational Society, so called, in said town, the interest thereof to be paid quarter yearly to the minister of the Congregational persuasion, who shall be regularly ordained and statedly preach in said Society." In 1819, under the statute passed that year, a religious society was formed in Dublin consisting, substantially, of the same persons who had constituted the Congregational Society. The newly formed society assumed the name of the "First Congregational Society in Dublin," and became, and has remained connected with the Congregational church of which Mr. Sprague had been pastor. There was no other Congregational church or society in the town at that time, nor till 1827, and no minister was settled in the town until some-

thing more than two years after Mr. Sprague's death, when the Rev. Levi W. Leonard was settled as the minister of the First Congregational Society. He has continued to be, and still is, the minister of that church and society; but in 1855 the Rev. William F. Bridge was ordained as his colleague, and since then, Mr. Bridge has statedly preached in the society. None of the church or society dissented to the settlement of Mr. Leonard, nor are shown to have objected to his religious opinions until 1827, when a few of his church and congregation seceded and formed a new society under the name of the Trinitarian Society in Dublin.

The town of Dublin paid the income of the fund to Mr. Leonard until Mr. Bridge was settled as his colleague, and since that have paid it to Mr. Bridge.

Mr. Leonard has held and taught the same religious doctrines from the time of his settlement, and Mr. Bridge agrees with him, substantially, in his religious opinions.

Mr. Leonard and Mr. Bridge are not Trinitarians, but Unitarians. They believe in the Father, Son, and Holy Ghost, one in purpose and design, but not the same in substance, equal in power and glory; in the divinity of Jesus Christ in the sense that he is a divine person, but not in his supreme divinity in any sense which they can understand; in the personality of the Holy Spirit; in the atonement in the sense of reconciliation by Jesus Christ, but not in a vicarious atonement; in regeneration by the Holy Spirit, but not in supernatural regeneration; that the Scriptures of the Old and New Testaments contain a divine revelation given by inspiration of God, and a perfect, and the only rule of faith and practice; in this sense, and in no other, in the full inspiration of the Scriptures: they do not believe in the doctrines of election, of predestination, of the perseverance of the saints, and of justification, as they are set forth in the Assembly's Catechism.

The bill and information called on the court to interfere with the application which the trustee has made of the fund, on the ground that Mr. Leonard and Mr. Bridge, on account of their religious opinions, are not ministers of the Congregational persuasion, and that their religion and the religion of the First Congregational Church and Society, is not the Christian religion within the meaning of the terms used in the will of Mr. Sprague.

Held, that where the original trustee appointed by the

founder of a religious charity applies the fund to the support of certain religious doctrines, and that application is long continued and acquiesced in, a court of equity will not interfere with the application thus made by the trustee, on the ground that the donor intended to limit his charity to the support of different doctrines, unless the intention to exclude the doctrines to which the fund has been applied by the trustee is plainly expressed in the instrument creating the trust.

That the terms "Congregational denomination," "Congregational persuasion," "Congregational church," and "Congregational minister," are used in their appropriate sense to signify the Congregational polity and form of church government, and are not the proper and appropriate terms to designate any creed, or to define any set or system of theological doctrines.

That Mr. Leonard and Mr. Bridge were not disqualified by their religious opinions from taking the income of the fund as ministers of the Congregational persuasion within the meaning of those terms as used in the will of Mr. Sprague.

That the First Congregational Society in Dublin, being composed, substantially, of the same individuals, having the same object and the same general character, and being connected with the same church, is to be regarded in the case as the same with the former Congregational Society, and that the minister of the First Congregational Society, being otherwise qualified, may take the income of the fund.

That the individual opinions of the donor were not competent evidence to aid in the construction of terms used by him to designate the religious doctrines to the support of which his charity was to be applied.

That the terms "Congregational persuasion," have no local meaning peculiar to New Hampshire; and that there has been no change in the use of the terms, or in the condition of the denomination since 1817, to affect the construction of the will in this case.

That the construction of the terms "Congregational persuasion," was a question of law, to be decided by the court as such; and that the opinions of witnesses, derived from their study of books, were not competent evidence to prove the meaning of those terms.

That Unitarians, holding the religious opinions of Mr. Leonard and Mr. Bridge, are to be regarded in the law of this State and within the meaning of Mr. Sprague's will, as one of the sects of the Christian religion.

MARTIN *v.* COLLISTER.

Levy upon real estate.

Where a debtor has an undivided share in several tracts of land descended to him from his ancestor, and his creditor has against him two executions, and, at the same time, levies one execution on the whole of the debtor's interest in one tract, and the other execution on the whole of his interest in all the other tracts, the levy being in other respects duly made, is valid.

COMBS *v.* WINCHESTER.

Examination of witnesses.

A witness who had not been asked whether a bolt in a carriage had a nut upon it, which would have been a question material to the issue, was asked, on cross-examination, if he had not said that he knew the bolt had no nut on it, with a view to contradict him if he denied it,—*Held*, that the question was immaterial and irrelevant, and therefore inadmissible.

The rule is, that any question, which could not be proposed by the party calling the witness, because of its immateriality, is immaterial when proposed by the other party; and if answered, the answer cannot be contradicted.

But this rule does not apply to questions respecting the state of feeling of the witness toward the party.

LEITH *v.* LEITH.

Divorce obtained in another State.

A divorce procured in another State under a statute authorizing the decree upon the application of a *bona fide* resident, and making the affidavit of the party *prima facie* evidence of the residence, is invalid in this State if it appears that at the time of the application, and of the decree, both parties were domiciled here.

The question of residence is open to inquiry in the

courts of this State, notwithstanding the record of the proceedings in granting the divorce is in due form and properly authenticated.

Harris *v.* Harris.

Partnership — Assumpsit.

The administrator of a deceased partner, who has paid a partnership debt, cannot maintain assumpsit against the remaining partners, to recover of them their proportion of that debt, the affairs of the partnership never having been adjusted, and no express and special promise to pay being shown.

Chapin *v.* Sullivan Railroad.

Railways — Fences — Trespass.

Under the statutes of New Hampshire, requiring railroad corporations to erect and maintain good and sufficient fences on both sides of their track, they are bound to erect and maintain such fences only against cattle rightfully running against them, and not against cattle trespassing either upon the lands of adjoining owners or upon their own track.

Railroads are not liable to the owners of lands adjoining their road for damages committed by cattle wrongfully permitted by their owners to run at large in the highway, and thence escaping upon the railroad track, and from thence, through defects in the fences of the railroad, upon the lands of such adjoining land-owners.

Sullivan. July Term. 1859.

Davis *v.* Clark.

Assault and battery — Costs on appeal.

In trespass for an assault and battery, brought in the Court of Common Pleas, in which the plaintiff recovered a verdict in that court for $13.33, and, on his appeal to the Supreme Court, a verdict for $33.33, his costs accruing in the court below are not to be limited (under the provisions of ch. 191, § 4, of the Rev. St.) to the amount of damages there recovered, nor his entire costs (under the provisions of § 7 of the act of July, 1855, remodelling the judiciary) to the excess of the latter verdict over the former.

PETITION OF NEWPORT.

Highways — Road from town to town.

Upon a petition, asking for the laying out of a new highway in two towns, originally presented to the Court of Common Pleas, if it appear, by the report of the county commissioners, that, in their judgment, no new highway was really needed, except in one of the towns, and that, consequently, none has been actually laid out, except in that town, such report is conclusive that, in the opinion of the commissioners, the petition should have been presented, in the first instance, to the selectmen of that town alone, and that the court have no original authority to establish the road laid out, and the report should be rejected.

A nominal laying of the road, in such a case, into the other town, by running from the new highway, actually laid in one town, over a pre-existing highway, so as to extend the new highway formally to the terminus of the route petitioned for in the other town, will not change the character of the report, or affect the disposition to be made of it.

Belknap. July Term. 1859.

HILL *v.* GILMAN.

Mortgages of goods and chattels.

The statutes of New Hampshire, which prescribe the manner in which mortgages of goods and chattels shall be executed and recorded, must, in general, be strictly complied with.

Where the statute required the mortgage to be sworn to, and that the certificate of the justice who administered the oath should be recorded with the mortgage, and it appeared that the oath had been administered, but the justice, through inadvertence, neglected to sign the certificate, and the mortgage, with the defective certificate, was thus recorded — *held*, that it was invalid against a *bona fide* creditor, who attached the property, notwithstanding he had knowledge of the mortgage as it appeared on the record.

DUDLEY *v.* ELKINS.

Agreements as to boundary lines.

An agreement between owners of adjoining lands, that the line between them shall be ascertained and settled by

a surveyor, is, when executed, conclusive upon them and all claiming under them; and not, as in some jurisdictions, merely strong evidence of the line.

Possession, up to a line run by a surveyor, in the presence and by direction of the parties, long continued without question, is evidence from which a jury may infer an agreement of the parties that the line so run should be conclusive.

Carroll. July Term. 1859.

STATE *v.* WEBSTER.

Conviction for a lesser offence upon an indictment for a higher Surplusage.

All unnecessary words in an indictment may, on trial or arrest of judgment, be rejected as surplusage, if the indictment will be good on striking them out.

Where the offence described in an indictment is a complicated one, comprehending in itself various circumstances, each of which is an offence, a respondent, charged with a greater offence, thus described, may be convicted of one of lesser degree contained in it.

Upon an indictment for assaulting or obstructing an officer in the service of process, a conviction may be had for assault and battery only.

To give the court jurisdiction of such an indictment, it is not necessary that there be a preliminary examination before a magistrate. And a conviction upon it, for assault and battery simply, does not oust the court of jurisdiction.

GRANT *v.* FOWLER.

Title by adverse possession.

Continued, open, visible and exclusive possession of land for more than twenty years, under claim and color of title, is sufficient to give a good and sufficient legal title thereto, without regard to the validity or regularity of the colorable title, or to the defects or insufficiency of the instruments conferring it.

Grafton. July Term. 1859.

STATE *v.* KINNE AND ALS.

Scire facias — Where to be brought.

A *scire facias*, brought to recover the forfeiture on a recognizance, is a civil proceeding, and must be prosecuted in a court having civil jurisdiction.

A *scire facias* can only issue from that court which has the record upon which it is founded.

Where an appeal was taken from the judgment of a justice of the peace to the Court of Common Pleas, which had jurisdiction of the appeal, and a recognizance was entered into before the justice to prosecute the appeal in that court, and the recognizance was there forfeited; and a *scire facias* was afterwards brought on the recognizance, in the Supreme Court — *held*, that, the record being in the Common Pleas, the action could not be maintained in the Supreme Court.

Morris *v.* Palmer.

Liability of husband for costs, upon complaint of the wife for a breach of the peace.

Whenever it is necessary for the safety of a wife to enter a complaint against her husband for a breach of the peace, the legal costs of the proceedings may be recovered of him by action.

Where a wife applied to an attorney, who made out a complaint against her husband for a breach of the peace, which was signed and sworn to by her, and such proceedings were had thereon that the husband was, in default of bail, committed to the jail of the county — *held*, that the husband was liable to the attorney for such charges as would be good against complainants in ordinary cases; and upon the ground that the services were *necessaries* furnished to the wife for her protection.

Kimball *v.* Fisk.

Appointment of guardians of the insane.

The proceedings of courts of probate, in relation to the appointment of guardians of insane persons, are not void, however irregular or erroneous, if the court has jurisdiction of the subject matter of the proceeding.

Want of notice to the party renders the proceedings voidable by parties injured; not void as to everybody.

Defect of form in the precept, or return of an inquisition, will not render them mere nullities, if the sanity of the party is made the subject of inquiry, and the selectmen make a distinct return as to that point.

The recital of a decree of insanity in the letter of guar-

dianship, is a sufficient foundation for an amendment of the record, by entering up such decree after proper notice.

Courts of probate have incidentally the power to adjourn when they judge it necessary for the transaction of the business; and this incidental power will not be restricted by a statute authorizing an adjournment in a specific case.

The constitutional provision, that probate courts shall be held at times and places fixed by law, having no negative words, is not necessarily construed to divest their jurisdiction at other times and places.

White Mountains Railroad *v.* Beane.

Conclusiveness of awards.

Arbitrators, who are not restricted by the terms of the submission, are authorized to decide all questions of law and fact arising in the case, and their decision, fairly made, is conclusive, and cannot be impeached, except by proof of some fraud practised on them, or of some mistake or accident, by which they were deceived or misled, so that their award is not the result of their judgment. But their mistakes in drawing conclusions of fact from evidence, or in adopting erroneous opinions of the law, are not a legal cause for avoiding their award.

Cross *v.* Gannett.

Note secured by mortgage — Statute of limitations.

No right of action upon a promissory note, secured by a mortgage of real estate, exists under the provisions of § 6, ch. 181, of the Rev. Sts., as against the statute of limitations, when the mortgage has been foreclosed, and the land thus applied *pro tanto* in payment of the note.

Whether the right of action against the indorser of a promissory note is extended beyond the statute law by reason of a mortgage given to secure the liability of the maker, *quære.*

Ford *v.* Holden.

Abatement of taxes — Right to vote — Action for money had and received.

If the abatement of taxes by the selectmen, at the request of the person against whom they are assessed, is to be considered an excusing from paying taxes, within the meaning

of the clause in the constitution, which excludes paupers and persons excused from paying taxes at their own request, from voting, it operates only to disqualify him as a voter during the political year for which the taxes were assessed, and not as a perpetual disfranchisement.

When the selectmen, in revising the check list, refuse to insert the name of a person applying until he shall pay the amount of taxes assessed against him in previous years, and thus abated, the money so paid may be recovered back in an action for money had and received against the selectmen, into whose hands it was paid, notwithstanding the person applying had no right to vote on other grounds, and the selectmen acted honestly and without corrupt motive; and although before suit brought, or demand made for the money, it had been paid into the town treasury as money belonging to the town.

If a demand before suit is brought is necessary in such case, it is sufficient if made by the attorney retained to commence the suit.

Gannett *v.* Blodgett and al.

Note secured by mortgage — Indorser — Surety.

The indorser of a promissory note, payable on time, with interest annually, secured by mortgage of real estate, who has been compelled by the indorsee to pay the annual interest due thereon, cannot maintain an action on the mortgage to recover possession of the mortgaged premises, while the note and mortgage still remain the property of the indorsee, and the principal sum is still due to him upon the note.

A surety can, neither at law or in equity, call for an assignment of the claim of his creditor against his principal, or be clothed by operation of law and on principles of equity, with the rights of an assignee of such claim, unless he has paid the entire claim; a *pro tanto* assignment, by substitution or subrogation, is not known or allowed.

Brown *v.* Mahurin.

Executory contract — Rescission of contracts.

Money paid on an executory contract may be reclaimed, and the value of goods sold and delivered upon such con-

tract may be recovered after the contract has been broken or rescinded by the other party.

One who sold hay and performed labor, under a contract that the same should be paid for in goods from the store of the other party, and afterwards received goods from that store to an amount greater than the value of the hay and labor, but was subsequently compelled to pay for the entire goods in cash, may recover the value of his hay and labor of the delinquent party.

Superior Court for the County of Essex.
September Term, 1859.

WILLIAM T. JULIO *v.* THOMAS N. BOLLES.

A witness resident in a foreign State, in attendance on a court of this Commonwealth, is privileged from service of civil process, as well as from arrest.

This was an action of contract. The writ described the defendant as of Newark, in the State of New Jersey. The officer (a deputy sheriff of the county of Essex), returned that he had attached a chip, and "delivered to the defendant a summons in hand, for his appearance at court," etc., etc.

At the return term of the writ, the defendant filed an answer in abatement, setting forth that at the time the writ was made and served upon him, there was pending in the Supreme Court for the county of Essex a suit wherein the present plaintiff was plaintiff, and Henry T. Ingalls and others were defendants, which had been referred to an auditor by a rule of that court; that a day had been assigned by the auditor for a hearing; that the defendant Bolles was a material witness for the defendants in that case, but was unwilling to come into Massachusetts unless he could be protected in so doing, having been threatened with a suit by the plaintiff; that he had no other objection to coming here, and that, upon his petition, and upon the order of the Supreme Court, a writ of protection was issued out of the clerk's office, a copy of which was annexed to the answer; that, relying on said writ, he came into the county of Essex

to testify before the auditor; that he had no other business in Massachusetts, and made no unnecessary delay in returning; that he was served with the summons in this suit, while in attendance before said auditor as a witness; that there was no collusion in the matter, but that he came here solely as a witness. The answer also alleged that no attachment of property was made on the writ, that the defendant never had any property in the State, and that he never was an inhabitant or resident of Massachusetts, nor had any last and usual place of abode here; and concluded with a prayer for judgment that our courts never acquired any jurisdiction over his person, in a civil action, and that the writ might be abated.

To this answer in abatement, the plaintiff demurred, and especially assigned the following causes of demurrer, viz:—

1. That the said answer, and the matters and things therein contained do not show that this court had not acquired jurisdiction of the person of said defendant, and of said cause.

2. That said answer does not show that said defendant was not liable to be served with summons in this action, in the form and manner alleged in the return of the officer on said writ, nor that said defendant was, by reason of anything alleged in said answer, privileged or exempted from the service of said writ upon him, by summons, as alleged in said answer.

3. That it is not alleged in said answer that said writ was served upon him in the form and manner alleged in said answer, against his will.

4. That it is not alleged in said answer, that at the time of the said service of said writ upon him, the said defendant produced or exhibited to the officer serving the same the said writ of protection, or that said defendant in any way objected to, or protested against the service of said writ, as aforesaid.

The defendant joined an issue of law upon this demurrer, which was argued in writing by *W. G. Choate*, for the plaintiff, and by *S. B. Ives, Jr.*, for the defendant.

The plaintiff's counsel cited *McNiel's* case, 3 Mass., 288, 6 Mass., 264; *Chaffee* v. *Jones*, 19 Pick., 267; *Booraem* v. *Wheeler*, 12 Vt., 311; *Hopkins* v. *Coburn*, 1 Wend., 292; *Hall* v. *Williams*, 6 Pick., 239; *Ewer* v. *Coffin*, 1 Cush., 23;

Picquet v. *Swan*, 5 Mason, 35; *Brown* v. *Getchell*, 11 Mass., 14.

The following cases were cited in behalf of the defendant: *Walpole* v. *Alexander*, 3 Douglass, 45; *Miles* v. *McCulloch*, 1 Binn., 77; *Sanford* v. *Chase*, 3 Cowen, 381; *Norris* v. *Beach*, 2 Johns., 294; *Hopkins* v. *Coburn*, 1 Wend., 292; *Gilbert* v. *Vanderpeol*, 15 Johns., 243; *Blight* v. *Fisher*, Peters, C. C., 41; *Parker* v. *Hotchkiss*, Wallace, Jr., 269; *Hays* v. *Shields*, 2 Yeates, 222.

After advisement, the following opinion was drawn up by MORTON, J. This is an action of contract. The defendant appeared specially, and filed an answer in abatement, to which the plaintiff demurred.

The question is whether the facts set forth in the answer, and admitted by the demurrer, seasonably pleaded, should abate the writ.

The only jurisdiction which this court has of this case is by virtue of the personal service upon the defendant, by "giving him a summons in hand," under the circumstances alleged in the answer. If this service was illegal, the jurisdiction fails, and the writ should be abated.

The plaintiff concedes that the defendant, at the time the writ was served upon him, being in attendance as a witness upon a court of this Commonwealth, was privileged from arrest upon civil process, but contends that the privilege extends no farther. The defendant claims that the privilege of the witness extends not only to exemption from arrest, but also to exemption from service by summons. And such, in the case of a witness who is resident in a foreign State, is the true rule of law.

The principle which throws around witnesses, while in attendance upon our courts, the protection of the law, is founded upon the necessities of the administration of justice. It is essential that a witness, who is called by our courts to aid in the administration of justice, should feel that he can answer that call freely, and without any fear of compromising his rights by so doing; and the law should, so far as it can, protect him from any molestation by civil process, which would, if permitted, have the effect to deter him from coming forward to testify.

In the case of a foreign witness, whom the process of our courts cannot reach, and whose attendance within our jurisdiction cannot be compelled, any other rule would often

impede, and perhaps defeat the due course of justice. Such a witness will be slow to approach our courts, if by so doing he exposes himself to the necessity of defending a suit at a distance from his home, and perhaps from his witnesses and other means of defence, as well as at great expense and inconvenience.

One principal object of the exemption being that the attendance of witnesses upon our courts should not be hindered or interrupted, the exemption should be extended as far as is necessary to accomplish this object. In the case of a foreign witness, the fear of a summons which would compel his attendance upon our courts for months and years to defend his rights, would often as effectually deter him from coming, as the fear of an arrest. In the one case, he may give security for his attendance; in the other case, his attendance is compelled by the moral power of the fact, that unless he attends and defends his rights, a judgment may be rendered against him, which will follow him to his home, and compel satisfaction there.

I think, therefore, that, in this case, the defendant was privileged from service by summons, that the service was illegal, and that the writ must be abated. There are no cases in our reports which decide this question, and I have been obliged to decide it upon principle, and upon considerations of public policy.

I think the answer in abatement alleges with substantial precision and certainty such facts as are sufficient to abate the writ; and I am unable to see any evidence that the defendant has, by any acts of his, waived the protection to which he is entitled by law.

The result is that the demurrer must be overruled, and the writ abated.

RECENT ENGLISH CASES.

Common Bench.

HODDESDEN GAS & COKE CO. *v.* HAZLEWOOD.

Contract — How terminable.

A gas company incorporated under the limited liability act supplied the town of Hoddesden with gas. The respondent was supplied with gas by the company for two years, paying for the gas quarterly, and paying for the use of a meter, yearly. He had altered his stoves and incurred much expense to enable him to burn gas instead of camphene. At the end of a quarter there was a dispute about the amount of gas consumed, and the appellants cut off the supply. *Held*, that there was no implied contract to continue the supply of gas, and that no notice was requisite before discontinuing it.

HEARTLEY *v.* BANKS.

Election law — Occupation as "owner or tenant."

The institution of Military Knights of Windsor is one of an eleemosynary character; the appointment thereto is not an appointment to an office, because an office necessarily implies duties as incidental to it, and religious observances and manifestations of respect by the recipients of a charity to their benefactors, are not services which constitute an office. Therefore the knights who hold and occupy rooms within Windsor Castle during good behavior are not entitled to vote in the borough of Windsor as "owners or tenants," within the meaning of the Reform Act, the legal estate being in trustees, and the occupation being in the nature of a charity.

HOLMES *v.* BELLINGHAM.

Private way — Right to soil — Presumption.

In the absence of evidence, there is a presumption that the soil of a private road, used as such by the owners of the land on either side, belongs to such owners respectively to the middle of the road.

Queen's Bench.

MACDONALD *v.* LONGBOTTOM.

Written contract — Quantity left to parol.

In a conversation between the plaintiff and the defendant, the former stated that he had for sale about 2,300 stones of wool, 100 stones, more or less, being his own clip, and that of several neighbors, who were named. The defendant soon after wrote a letter offering a certain price "for your wool," which offer the plaintiff accepted by letter, in due course of mail. The plaintiff offered the defendant the wool contained in the clips mentioned in the conversation, amounting to 2,505 stones, and the defendant rejected it on the ground of excess in quantity.

Held, (by the whole court,) that the conversation was admissible to show the wool to which the contract referred.

Held, by Lord Campbell, C. J., and Erle J. (Wightman J. dissenting,) that the contract, so explained, did not contain a condition that the amount should not vary more than 100 stone from 2,300 stone, but that it was for the jury to say whether the excess was so unreasonable as to avoid the contract on the ground of misrepresentation.

REG. *v.* EDMUNDSON.

Construction of statute — "Place."

Under St. 17, Geo. 3, c. 56, which enacts that if any materials entrusted by a master to a workman, and suspected to be purloined or embezzled, "shall be found in any dwelling-house, out-house, yard, garden, or other place or places, the person in whose house, &c., the same shall be found, if such person shall not give an account to the satisfaction of the justices how he came by the same, shall be guilty of a

misdemeanor." *Held*, that a warehouse, although not within the curtilage of a dwelling-house, is a "place" within the meaning of the statute by *ejusdem generis*.

Exchequer.

SOLOMON *v.* THE VINTNER'S COMPANY.

The plaintiff owned a house, adjoining which, on the west, was a house of a third person, and adjoining this two houses of the defendants'. The four houses had for more than thirty years past leaned towards the west. The defendants contracted to have these houses pulled down and others built in their places; and by reason of the taking down of the houses, the plaintiff's house fell. *Held*, that the plaintiff had not established his claim to support for his house from the defendants' houses.

V. C. Kindersley's Court.

Re MAIDEN'S TRUST.

Fraud upon a power.

A married woman having power under a deed to appoint certain personal property among all or any of her children, wished to give her husband some benefit of the property, and caused an appointment to be made to one child only, with the intent, not communicated to the child, that the child should give a part of the property to her father. *Held*, a fraud upon the power and void.

Crown Cases Reserved.

REG. *v.* MORRISON.

Larceny — Pawnbroker's ticket — Receiving stolen goods.

A pawnbroker's ticket is the subject of larceny as a "warrant for the delivery of goods," within 7 & 8, Geo. IV. c. 29. So at common law. It is a token, authorizing and requiring the delivery of certain specific goods belonging to the pawner, and which might in an indictment be laid as in his possession. It is not within the exception of title deeds; nor that of writings which purport to give a right of action only, as bonds, &c.

Therefore a conviction for receiving such a ticket, knowing it to have been stolen, was sustained.

Court of Appeal in Chancery.

ATTORNEY-GENERAL *v.* CHAMBERS.
SAME *v.* LEWIS.

Seashore — Artificial accretions — Act of ownership.

The boundary line of the right of the crown upon the sea-shore, has already been decided to be "the medium line of high water of all tides occurring in the ordinary course of nature, throughout the year."

Held, that when this line had receded, the lands being raised by imperceptible accretions from the sea, although those accretions are the result of artificial causes, the land so gained will belong to the owner of the adjacent land, unless it be shown that the artificial embankment or operations were made with the intent to produce the accretion.

L claimed the sea-shore, in front of his marsh, upon the ground that for more than sixty years his cattle had been in the habit of crossing the line between the marsh and the sea-shore without interruption.

Held, that mere use would not be sufficient to establish the right in such a case, the land being of a nature not easily protected from intrusion, and not being worth the trouble of such protection.

Re THE MEXICAN AND SOUTH AMERICAN COMPANY, *ex parte* ASTON.

Evidence — Witness — Privilege.

A stock broker summoned to give evidence before the examiner, under the winding-up acts, declined to answer questions relating to his dealings in shares of the company against which proceedings were being had, on the ground that "he was advised that the company was illegal, and that by answering he might render himself liable to criminal proceedings or to penalties." The master of the rolls ordered him to attend for further examination.

Held, that the ruling was right. That where a witness gives a reason for his declining to answer, the court is to judge of the sufficiency of the objection. It may be otherwise, (as suggested in *Fisher* v. *Ronalds*, 12 C. B. 765,) if the witness declines to answer simply, and refuses to give reasons.

Exchequer Chamber.

LEVY *v.* GREEN.

Contract — Goods exceeding order — Appeal.

In the court below, the Queen's Bench, a verdict was entered for the plaintiff, with leave to the defendant to move to enter a nonsuit; upon the hearing of this motion, the rule dropped, the court being equally divided in opinion. *Held*, that the defendant could appeal to this court under the statute which enacts that "in all cases of rules, &c., the party decided against may appeal."

The defendant, a retail dealer at Peterborough, ordered certain goods of the plaintiffs, who were wholesale dealers at Bristol, with a caution that the order was not to be exceeded. The plaintiffs sent by railway a crate containing the articles ordered, and other articles of a different kind; they sent an invoice to the defendant, giving the price of each item, and showing a total amount as due, which included all the items. *Held*, that the defendant had a right to reject the whole, on account of the articles sent which had not been ordered.

McMANUS *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway company — Special contract, St. 17 *&* 18 *Vict., c.* 31.

The statute (17 & 18 Vict. c. 31,) enacts that every railway company shall be liable for loss and damage to cattle, horses, &c., notwithstanding any notice, condition, or declaration made or given by said company contrary thereto, or in anywise limiting such liability; "provided, however, that they make such conditions for the receiving, forwarding and delivering of any such animals, &c., as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable." Then follow provisions about the value of the animals, and about the burden of proof, and then: "provided, also, that no special contract between such company and any other parties respecting the receiving, &c., of any such animals, &c., shall be binding upon such party unless signed by him, or by the person delivering such animals, &c., for carriage."

Held, (sustaining the view heretofore taken by the C. B. & Q. B., and overruling that taken by the Exchequer,) that the provision in respect to the conditions being adjudged reasonable, applies to the special contracts mentioned in the subsequent proviso; that is, that such contracts must not only be signed, but must be reasonable.

Held, also, that a condition in such a special contract, duly signed, that the company should not be liable for damage, however caused, was not reasonable.

Nisi Prius.

Northern Circuit. Liverpool, Aug. 26.

[Before Mr. Baron Watson.]

Boylan *v.* Godfrey.

Negligence of attorney — Frivolous plea.

This was an action to recover compensation for the alleged negligence of the defendant, an attorney at Liverpool, in conducting the defence of the plaintiff in a petition filed by the plaintiff's wife in the Divorce Court for a judicial separation, in not pleading and proving the adultery of the plaintiff's wife, whereby the plaintiff was decreed to pay £1 a week to his wife who was judicially separated from him.

Monk, Q. C., and *Brett* appeared for the plaintiff, and *James* Q. C., and *L. Temple* for the defendant.

It appeared from the opening speech of the learned counsel for the plaintiff, and from the evidence, that the plaintiff was married at the German Church in Dublin, in 1833, and that after the marriage he and his wife cohabited together and had seven children, two sons and five daughters. At the time of the marriage the plaintiff did not believe it to be a valid marriage. After three children were born the plaintiff and his wife lived at Waterloo, near Liverpool, where the plaintiff's wife let lodgings. They then separated, and the plaintiff allowed his wife a separate maintenance. In May, 1858, the plaintiff's wife filed a petition in the Divorce Court for a judicial separation, and, through the introduction of a man named Boosey, the plaintiff made the acquaintance of the defendant, who is an attorney at Liverpool, and whom he instructed to take the necessary proceedings to defend the petition. The plaintiff instructed

the defendant to deny the validity of the marriage, and also to deny the allegations contained in his wife's petition of cruelty and adultery, and also to allege against his wife that she had been guilty of adultery, and he gave the names of the witnesses to the defendant who could prove the fact of adultery committed by the wife. At the trial the question of the marriage was adjudicated against the plaintiff, but to his surprise he found that nothing was said, nor was any inquiry instituted, regarding the alleged cruelty, which he denied, nor regarding his wife's adultery, which he was prepared to prove, and he subsequently discovered that the plea which would enable his counsel to raise this defence had been omitted from the record, and this was the negligence complained of. The result was, that the Divorce Court had decreed a judicial separation against him, he had a large sum of money to pay to the defendant for conducting his case, had been saddled with the costs of the suit, and was ordered to pay £1 a week to his wife for the remainder of her life, she being now but forty-six years of age. The plaintiff denied the cruelty alleged, and believed that his wife had committed adultery, and had fully instructed his attorney to set up these defences to the proceedings of his wife in the Divorce Court, but the defendant, with full knowledge of the facts, had neglected to put the pleas on the record which enabled him to set up these defences, and for this negligence the action was brought. The plaintiff, who was sworn, denied the cruelty imputed to him on oath, and swore that he could prove that his wife had committed adultery both at Waterloo and in France, and that he had given the particulars to the defendant's clerk, who took them down in writing, and also the names of Mary Bowles and Margaret Hanlon, his witnesses. He had paid the defendant upwards of £20 in advance to conduct his case, and take the proper steps for the defence against the petition, and had procured the attendance of his witnesses in London when the case came before the Divorce Court in November last, but the defence which he had instructed to be raised he was told could not be gone into, and a judicial separation was decreed, with £1 a week alimony to be paid by him. It appeared on cross-examination that the plaintiff was now living with his housekeeper, and that he had lived and cohabited with a woman named Russell, that he had frequently left his family in want, and had neglected to

pay the alimony to his wife which he had been decreed to pay.

On the part of the defendant it was proved that the instructions of the plaintiff were found, on examination, to be frivolous, and that there was no ground for imputing adultery to his wife, and therefore a plea setting up that defence had not been placed on the record. The wife of the plaintiff was placed in the box, and she denied on her oath the facts charged against her imputing adultery, and her daughters proved that, so far as they had ever observed, the conduct of their mother had been exemplary.

His Lordship, in directing the jury, told them that it was the defendant's duty, if satisfied on the evidence before him that there was no ground for imputing adultery to the wife, not to place a plea on the record which was frivolous, and could only lead to an useless waste of the public time.

The jury found a verdict for the defendant.

NOTICES OF NEW PUBLICATIONS.

TRIAL BY JURY.

1. The Dark Side of Trial by Jury. By Joseph Brown, Esq., of the Middle Temple. London: Maxwell. 1859.*
2. Unanimity in Trial by Jury Defended. By G. Rochfort Clarke, Esq., of the Inner Temple. London: Stevens and Norton. 1859.

"Let us, then, magnify trial by jury! No man can say too much in its favor!" Such is the gushing and enthusiastic exclamation of Mr. Rochfort Clarke. "I arraign trial by jury at the bar of public opinion. I accuse it of incapacity, of ignorance, of partiality, of cumbersomeness, of barbarism." So writes Mr. Joseph Brown, at page seven of his pamphlet. Now each of these gentlemen practises at the common law bar, — each has had long experience as a special pleader, and they both belong to the same circuit. They have had, therefore, and still enjoy, similar opportunities of forming a deliberate and careful judgment concerning the tribunal, the merits of which they have discussed in the pamphlets above mentioned. The result is, one learned lawyer pronounces an unmeasured eulogy on it in all its aspects and relations; the other condemns it absolutely as a monstrous folly, and a mischievous relic of barbarism.

When, of two intelligent, experienced and honest men, the one can see nothing but good in an institution with which they are both familiar, and

* Having just received this pamphlet from England, we cannot do better than to republish the following article from the Law Magazine, on the jury controversy and the leading publications on either side.

the other nothing but evil, the phenomenon is worth observing for its own sake. It serves, moreover, to illustrate the general character of that class of conflicts of opinion which concern social institutions, and on which the weight of authority and dogma is always brought to bear, and sometimes assumed to be conclusive.

The questions relating to the tribunal of trial by jury are about to undergo, as it seems to us, the process now termed "ventilation;" and there will be exhibited, therefore, to the public the spectacle of a certain number of learned (and still more of unlearned) men supporting opposite sides, drawing adverse conclusions from the same premises, or discarding one class of facts whilst they exaggerate the importance of others; and the discussion will naturally excite the usual amount of prejudice and bias on the one side, and temerity and experimental essay on the other. The excuse for this treatment of political and social topics, when under public discussion, appears to be, that, in point of fact, no step in life, and no measure relating to human affairs, can be taken to which some objection cannot be raised, or the possibility of evil consequences ensuing not be foreseen. Rash innovation, again, produces persistent obstinacy; a bad reason for a good measure generates indifferent arguments for maintaining an imperfect system. Moreover, the logical weighing of advantages and disadvantages, the impartial watching of the balance of reason, even when self-interest does not come into play, is the result of an uncommon exercise of the rarest of all faculties — a sound judgment. As a general rule, differences of opinion create parties; and when once men have become partisans, persuasion is of course out of the question. Invective takes the place of reason — stubbornness is resorted to as a defence — blindness, hardness of heart, and all uncharitableness, flourish; and the partisan then became a slave to a dogma, and a mere repetition machine of routine plausibilities. If the dispute on the jury system proceeds in a normal fashion, we believe Mr. G. Rochfort Clarke will be found soon prepared to die happy, upon his being convicted of a capital crime by a jury of twelve men; whilst Mr. Joseph Brown would surrender, in the pious ecstasy of martyrdom, the bar, and all its present profits and promises for the future, on the condition of an educated, trained, and model bench of *judices* sentencing him to penal servitude for the term of his natural life. The disciples also of those excellent lawyers (independently of being their juniors, and willing to undertake the professional labors which would devolve upon the rest of the profession if the criminal law were put in force as above suggested) would doubtless approve of such self-sacrificing magnanimity of the great leaders in the jury controversy, if not called upon to share to the full extent in their hypothetical fate.

We shall endeavor to put the subject on the real footing on which it seems to us it should be discussed. It is of no use merely to rail at juries — to point out that the present system produces frequent miscarriage of justice; nor, on the other hand, does it avail to reply that trained and skilled judges have been repeatedly known to take erroneous views of matters of fact, as well as to propound much false doctrine in law.

If any one thinks that he cannot laud and "magnify" the institution of the jury too much, because it is absolutely perfect, we must take leave at once to differ from him; first, because, as a matter of fact, no tribunal ever has been or can be perfect; and next, because general experience contradicts his declaration. The question which alone ought to be before us is this: — Is trial by jury, as now instituted, the best practicable mode of eliciting the truth, when disputed by litigants in Great Britain and Ireland? And this inquiry may be prosecuted both by induction and deduction.

They who attack the institution urge, that *a priori* to pick up casually twelve men not accustomed to weigh evidence, nor to continuous thought in any way, and to call upon them to decide upon disputed facts or strange subjects, especially when the inquiry is accompanied with the drawbacks of technical difficulties, and encumbered with professional artifices, is simply absurd. It is assuming the preposterous proposition, that a common jury, uneducated to the duty, possesses by intuition "the faculty of hearing without being deluded by sophistry and eloquence, of catching and connecting, as it flies, the broken and disjointed evidence of numerous and contradictory witnesses; of selecting what is material and rejecting what is irrelevant; of sifting the wheat from the chaff, the substantial from the seeming, and extracting the kernel of truth from the misshapen husk of errors in which it is enveloped." — (*Dark Side of Trial by Jury*, p. 9.) They further argue that, in point of sublety and acuteness, the jury is not on a level with the advocate, that professional sophistication and appeals to common or special prejudices, by his refined art and practised acuteness, are means not calculated to secure the ends of justice.

They allege that there is no responsibility felt when the onus of finding a verdict is divided among twelve men, who, extracted casually for the first time from a numerous public, are virtually anonymous, and are silently reabsorbed amongst the multitude. In the olden days the writ of *Attincta* lay against a jury for giving a false or perverse verdict, and grievous were the penalties attached to conviction of this crime — the liberty, property, and all legal rights of the false juryman were forfeited for ever; but this contrivance for preventing or punishing perjury having been long obsolete, and being now abolished, each member, with his nominal one-twelfth of responsibility to bear, is practically free; and when the foreman declares (as one did lately in the sheriff's court) that they found "magnanimously" for the plaintiff — it may be inferred that such is the verdict of *some* at least out of the twelve, but also that some have taken the responsibility of saying so, and the rest of allowing them so to say.

But, coming to the arguments founded on experience, we find the absurdities of opinion, and foolish and ignorant verdicts, insisted on. So, too, the scandals of the jury-room; the tossing up, balancing a poker, drawing lots, compromising differences, are all pointed out as significant facts. The frequency of new trials, moreover, and the general uncertainty of verdicts, are very striking circumstances in the history of our jurisprudence.

Again, observes Mr. Amos, "A jury gives no reason for its decision; and persons who casually, or upon inquiry, have become acquainted with the grounds on which a jury, or one or more jurors, have decided a case, will have often found that they were influenced by some reasons which totally escaped both the judge and counsel; and which, if they had been stated in court, could have easily been shown to have been founded on ignorance of the rules of evidence, or some mistake of law or of fact, generally the former. Thus, clandestineness in judicial deliberations, and concealment of the grounds for decisions affecting life, liberty, character, and property, make an inquest of twelve men bear a strong affinity to the celebrated Council of Ten. They occasion, moreover, a peculiar species of uncertainty in the verdicts of juries which I do not recollect to have seen noticed by our law-writers. Suppose that a plaintiff rests his claim upon three distinct grounds; say the action is for the breach of the warranty of a horse, and the plaintiff contends that the horse has three faults — is spavined, broken-winded, and glandered. Four of the jury believed in the glanders, eight disbelieve; and the like as to the broken wind and

the spavin. Under these circumstances, if the question be proposed generally to a jury, 'Do you find for the plaintiff or for the defendant?' they would find a unanimous verdict for the plaintiff, though they would have negatived by a large majority every ground upon which that verdict was claimed; but if the jury were asked their decision separately upon the three breaches of warranty, the plaintiff would not be entitled to a verdict. A similar result, and one which is more difficult to be guarded against, is often obtained when a single ground of action is supported by distinct heads, or pieces of testimony, concerning the credibility of which respectively the jurymen differ in opinion. Thus, suppose a criminal charge, which rests entirely on the evidence of an accomplice and that of a confession, and six jurymen believe the accomplice, but do not give credit to the confession; while the other six rely on the confession, but repudiate the evidence of the accomplice, the result is a unanimous verdict of '*guilty!*'" The above learned writer may well ask whether this vicious accumulation of minorities may not in many cases, by simulating the character of majorities, have dealt much injustice!

To these enumerated objections we may add another, which, probably, delicacy on the part of Mr. Joseph Brown has prevented him from expressing, but which we have no hesitation in pressing upon the attention of the legal profession. We refer to the effect the jury system has on the production and maintenance of the mere *Nisi Prius* advocates — that class of men, we mean, who, destitute of law, and perhaps, in addition, shallow in understanding, vulgar and claptrap in address and language, but practised in the congenial task of talking *down* to a common jury, and with a natural capacity for blustering, bullying, browbeating, humbugging, and the use of those cunning arts calculated to mislead an ignorant body of men in a position novel to them; but which are threadbare and transparent to those who, like the judge and counsel, are condemned now to be perpetually witnessing these contemptible "tricks of the trade." Degeneration is a process which quickly ensues among men of this order, who thus bring contempt upon the profession of law. The inferior specimens of those who thus thrive by the common jury system, would never hold another brief if a competent audience were to be addressed. We have heard that one of this latter division of the class in question has one story, which he invariably introduces to every fresh jury at his sessions and elsewhere, somewhat in this way: — Having tried to misstate a piece of evidence, first in one way and then in another, and being as often checked by the counsel on the other side, this accomplished advocate invariably exclaimed in his pure English and accomplished style, "Why, gennelmen! my learned friend, gennelmen, is like the soldier, gennelmen — he don't like it any way. The soldier, gennelmen, you know, when he was being flogged, you know, kept complaining he was 'it too 'igh or too low, you know — there was no pleasing him, gennelmen, you know. My learned friend is like the soldier, gennelmen," &c. Doubtless it was to this counsel's arguments on one occasion, *in banc*, that his pert junior said he wished to add nothing but the H's. In the continual succession of fresh juries the stalest and poorest of jokes, the most superficial of arguments, and despicable appeals to prejudice, pass muster. There are, as we have just observed, ranks and degrees among the *Nisi Prius* lawyers, fostered by the jury system. Some, it is true, endowed with natural eloquence, are capable of better things, and can occasionally rise superior to the bad habits engendered by their successes in a limited and ignoble field of operations. Rapidity in apprehending facts, ingenuity in unfolding them, skill in evading legal questions, and in cloaking personal legal deficiencies, are valuable qualities,

and will account for such success as they bring; and these qualities may be, and doubtless are, occasionally conjoined with others, which together form the accomplished leading advocate. On the whole, however, forensic talent is debased by the necessity imposed on counsel of gaining their verdicts through the understandings and prejudices of imperfectly educated men, and these generally of a low intellectual standard.

There are yet other charges, founded on experience, which are brought against trial by jury, to which we must advert: — "No insurer resisting a life policy — no great company resisting a claim for an accident — no lawyer or doctor suing for his bill — no gentleman contesting the charges of a tradesman — no landlord suing for a forfeiture — no person who has rendered himself by any means unpopular, can safely depend on the impartiality of a jury. The fact is familiar to every lawyer, and calculated on beforehand. Nay, even a merchant of London suing a trader of a country town, is not safe in a disputed case with a jury of that town. In parts of Wales, a Welsh jury can hardly be got to do justice to an Englishman against a Welshman."

What are the chances of a true verdict, it is again asked, "when national or religious prejudices envelope the case?" How would the case of Achilli *v.* Newman, have resulted if the jury had been constituted of Roman Catholics? In Ireland proved assassins and conspirators are acquitted, and a verdict of wilful murder brought in against Lord John Russell, because a poor man had starved in the time of famine! Railway companies, and other wealthy defendants, have verdicts against them in defiance of all evidence. Compassion for the sufferer, and his right to compensation are often times confused, and flagrant injustice is committed. Besides lawyers, apothecaries, bill-discounters, sheriffs' officers, and others, according to Mr. Brown, have very little prospect of getting a verdict; and generally before a common jury, no gentleman should attempt to resist a tradesman's bill, however exorbitant, nor any sane but injured inhabitant of a county sue a justice of the peace thereof, for acts of tyranny or illegality, before a special jury.

No remark is more common among lawyers, than "In this case we must have a special or common jury," as the case may be; the object being to secure a tribunal, the known sympathies or prejudices of which may be favorable to the success of the client whose interests are being considered.

So far as we can collect them the above are the more common arguments brought against trial by jury. For that of the *inconvenience* to the jurors we do not regard as of great cogency, the present improper mode of summoning them, detaining and maltreating those in waiting, being matters relating to detail, and do not touch principles. In the clever lecture by Mr. Amos, already referred to, the reader will find some excellent and pertinent remarks upon the relation of the county courts to the trial by jury, as well as upon the unanimity of juries, which the author has so discussed as to have anticipated much which has since been said on the subject.

Let us now listen to the advocates for retaining trial by jury. They advance many well-known and substantial reasons on its behalf. Indeed, they seem to prove too much; for in the greater number of appeals to the law — civil or criminal — the intervention of a jury *is* already dispensed with. In the courts of Chancery, Admiralty, Probate, Bankruptcy, and Insolvency, questions of fact as well of law are left to the bench. In the county courts juries are the exceptions; in the Divorce Court their employment is in the discretion of the judge. In the Superior Common-Law courts at Westminster, there is a large proportion of cases withdrawn from

the jury-box, and submitted to professional reference or that of the masters, and occasionally that of the judges. Not unfrequently the counsel or solicitors on either side "arrange" the dispute rather than trust it to a jury, thus constituting themselves the arbitrators. So also many causes are turned into special cases. In the result, only a small part of our vast civil litigation is submitted to the adjudication of juries. In criminal cases the returns show that the magistracy disposes of by far the greater number of delinquents. Hence it is obvious that they who "magnify" with Mr. Clarke trial by jury, ought also to strive to "multiply" its application in many more instances than the present state of the law and its practice admits of. As their intention does not travel to this extent, it is a plain admission that the tribunal is not a suitable or necessary one in a large proportion of the litigation in this kingdom.

The grounds for maintaining the present jury system in its present state — we cannot call it integrity — appear to us to be as follows: —

1. It has been handed down to us by our forefathers.

2. There is great difficulty in finding another which we *know* would work so well, and be as little mischievous as the present. The habitual and constant exercise of the office of weighing contradictory evidence, and balancing opposing probabilities, would exhaust the mind of a single judge bound to decide on facts as well as law, and listening to the rapid succession of causes tried at *Nisi Prius*. "Although it may sound paradoxical, it is true that the habitual and constant exercise of such an office tends to unfit a man for its discharge. Every one has a mode of drawing inferences in some degree peculiar to himself. He has certain theories with respect to the motives that influence conduct. Some are of a suspicious nature, and prone to deduce unfavorable conclusions from slight circumstances. Others again err in the opposite extreme. But each is glad to resort to some general rule by which, in cases of doubt and difficulty, he may be guided. And this is apt to tyrannize over the mind when frequent opportunity is given for applying it. But in the ever-varying transactions of human life, amidst the realities stranger than fictions that occur, where the springs of action are often so different from what they seem, it is very unsafe to generalize, and assume that men will act according to a theory of conduct which exists in the mind of the judge." — (*Forsyth*, pp. 443, 444.)

3. In political prosecutions the jury has stood, and is likely to stand, between the government and its intended victims; and if the institution be curtailed in civil suits, the thin end of the wedge has been inserted, and thus the protection of the subject from the law and its officers in future history will soon be lost.

4. A jury taken from the general public is likely to be entirely impartial. By this, we presume, is meant that twelve men, casually brought together out of a multitude, are not likely to have any *personal* relations with, or predilections for the plaintiff or defendant, and it has special reference to a densely populated district, and not to some localities, as in Wales, Scotland, and Ireland, where inhabitants are sparse, and clanship is prevalent. Nevertheless cases do occur where personal sinister influences do affect justice, as in the case of the pertinacious juror who stood out against his eleven brethren, notwithstanding palpable proofs of guilt, in a capital case. The majority, thinking that there must be some secret and powerful grounds for their colleague's adherence to his opinion, acquiesced therein, and found the verdict of Not Guilty. They unfortunately did not know that the prisoner at the bar was the sole surviving life in a copyhold estate in which the virtuous and steadfast juror — *justus et tenax* — was interested.

5. A body so selected will give a fair average representation of the view which the public in general would take of the facts of the case when presented to them at large, and therefore will be perfectly satisfactory to the judgment of the community.

6. The "common sense" view of a case (which is assumed to be that especially closely allied to truth) will be probably taken by twelve ordinary minds when an opportunity is given them, as now for discussion, and when those doubts and difficulties which arise may be compared and resolved in conclave.

7. That merchants, tradesmen, and others engaged in the business of life, understand better than others transactions in the world, and especially those connected with matters about which litigation usually arises.

There is, however, another class of reasons not affecting the aptitude of the jury system for eliciting truth, but advanced on other grounds. Thus, it is said: —

8. The concurrence of the people in the administration of the law through the medium of the jury, greatly increases the popular respect for the law and judge. "In deciding upon facts, opinions will necessarily vary, and judges, like other men, are liable to be mistaken in estimating the effect of evidence. Every one thinks himself competent to express an opinion upon a mere question of fact, and would be apt to comment freely upon the decision of a judge, which on such a question happened to be at variance with his own. It is easy to conceive cases where much odium would be incurred if, in the opinion of the public, the judge miscarried in a matter which the public thought itself as well able to determine as the judge. From this kind of attack the judge is now shielded by the intervention of the jury. He merely expounds the law, and declares its sentence; and in the performance of this duty, if he does not always escape criticism, he very seldom can incur censure. So that De Tocqueville is strictly right when he says — 'Le jury qui semble diminuer les droits de la magistrature, fonde rèellement son empire; èt il n'y a pas de pays oú les juges soient aussi pauissans que ceux oú le peuple entre en partage de leurs priviliges.'" — (*Forsyth*, p. 444.

9. That the jury-box is "where men are best instructed in the law." They learn to administer justice by administering it. "Even the people that stand by are receiving useful lessons," says Mr. Rochfort Clarke, "and all owing to this popular form of trial." He remarks, "The people take the deepest interest in our trials and arguments. They love their queen and country — they are peaceable and loyal — they like to listen to trial by jury;" and the learned author further deposes to their enjoying his and and other learned counsels' "wit and repartee," and to the flattering attention given to their most astute and learned arguments, "trying to understand even when they fail;" and finally, they pay a grave attention to the summing up by the judge, and await, often with anxiety, the verdict of the jury;" and he declares, complimenting too highly the judges and counsel, as well as the tribunal which he is upholding, that this "is more *ennobling* than a pantomime, and quite as amusing!" We have inserted this argument simply because we have found it in Mr. Clarke's pamphlet; but as *we* never have been *ennobled* by a pantomime, and very seldom amused by listening to and arguing demurrers, we feel a difficulty in dealing with the statement. We have, however, in deference to Mr. Clarke's experience at pantomimes entered on the inquiry with some youthful friends, and we have failed to elicit the fact, that even *their* characters have been augmented in dignity, or their notions ennobled by the Christmas relaxation, which we further understand is abhorred by the really de-

vout, although frequently indulged in by the frivolous, and connived at by the lukewarm. We have indeed arrived at the conclusion, upon universal concurrence of the testimony of those youthful witnesses, that they enjoyed a pantomime because it was "such fun!" This, no doubt, is the explanation of the enjoyment by the audience on some trials by the aid of a jury; but the plaintiff, or defendant, or both, have frequently appeared to us not to share in the general mirth, so dexterously aroused by the low comedy of the actors, nor did they appreciate the excellent opportunity they were affording for the legal instruction of the jury, and the elevation of the public mind. The Westminster and Guildhall pantomimes are, we will venture to suggest, too expensive, and played too exclusively at the cost of others to justify their continuance on this ground.

11. The intervention of a jury is the safeguard against property, liberty, and rights being abused by unjust and improperly appointed judges; in other words, it is a safeguard against judicial corruption, and forms, what Jeremy Bentham half a century ago called a *check* on judges.

12. That the social uses of the jury are great, in bringing men to deliberate and act together for mutual and general purposes, giving them an interest in the administration of the laws, and knowledge of its operation, its advantages and defects.

13. This trial by jury is thoroughly English. Many of the above propositions and arguments, which we have endeavored to collect from those who have considered the subject, need not here be dwelt upon. Many of our readers are familiar with the subject in its practical form, and all are acquainted with certain of the defects in the institution and certain of the benefits derived from it. Nevertheless, members of the legal profession are doomed to hear frequent repetitions of common-place fallacies on this topic; and this is a process which has more or less a deleterious effect upon most minds. Unless one actively contests the continual pressure of the multitudinous voice, and reiterated assertions which find free expression on a popular subject, one runs the danger of either passively acquiescing in, or at least being supposed to assent to their validity. Besides which, many have necessarily had only the opportunity of taking a partial view, and profiting by a limited and local experience. One counsel may, from the beginning of his practice, have been lucky enough to have seen chiefly the working of special juries in the city of London—the best tribunal, without doubt, for deciding on mercantile cases, where the customs of merchants, the natural operation of business, and mixed law and fact, are in dispute. Another man may have had his professional career centred at some sessions presided over by an incompetent, weak, and prejudiced chairman, and who would endeavor to convict every prisoner indicted for sheep-stealing if he were suspected likewise of being a poacher. In this case, according as juries were wont to be swayed by the bench, or acted in defiance of the chairman's directions, would the practitioner found his opinion on their utility. He would naturally laud the institution which protected the prisoners from class prejudice on the one hand; while on the other, if it had been obvious that such was not the result, but that the judge generally induced his jury to incorporate *his* prejudices into *their* verdict, thus relieving him of its responsibility, an opinion would have been naturally formed that juries were useless or mischievous. A third barrister may have been more accustomed to see, in one of not a few districts in our country, justice being continually prostrated by the stupidity or prejudice of the jurors, or their general prepossession in favor of the ranting of the prisoner's counsel, or by their natural sympathy with rogues in general. Here honest indignation will lead the observers to denounce the jury system as a curse to the land. We will therefore venture

to point out generally what seems to us to be the real value of the points above raised in the discussion.

The *first* ground we noted, which might be taken *a priori* against the jury system, was, that it was theoretically absurd. The *last* reason referred to in favor of form of the trial, was, that it was thoroughly *English*. But these two propositions are by no means inconsistent. Our political constitution, and our social and legal institutions, are not the creation of the theorist, who, from metaphysical considerations, and on psychological grounds, has constructed what *ought* to suit the inhabitants. In other countries, perhaps the boot is first made, and the public's feet are subsequently thrust in. In England the boot is endeavored to be made to fit the foot, and presents, therefore, the ungainly appearance of much patching, stretching, shrinking, and occasionally bursting-out. Apparent anomalies, or theoretical absurdities, are therefore by no means, in these matters, un-English in character.

In this case, the fact that the jury system is thoroughly English really has a meaning. It signifies that the institution has grown to be what it is. If a recent statute had enacted that causes should for the first time and henceforth be tried before twelve men, collected as now, it would appear *a priori* (nay, it would be) a very absurd law. It is because, centuries ago, there was an institution different in many particulars, but which has developed into the present jury system, that it is thoroughly *English*, and one for which there is much real national affection. The original principles upon which juries were summoned were that "every trial should be out of such place, which by presumption of law can have the best and most certain knowledge of the fact," and that the jurors should therefore come into the box "prejudiced," and ready to supply evidence rather than receive it. The jurors were in the nature of witnesses. The transition from this principle to that upon which the common jury system is now founded and approved, are so different that it might be deemed at first sight the result of violent revolution rather than natural development; but it is all the more natural for this very reason. There is, we all are aware, intrinsically a vast difference between the duties and intention of juries during the last century and a half, and those of the preceding centuries. In 1679, Nathaniel Reading (7 State Trials), taking rather our modern view of the position and duties of a juror, desired when on his trial to challenge one Sir John Cutler, on the apparently rational ground that there was a close connection between him and the prosecutor. "I have," he urged, "seen him in company with Mr. Bedlow, mine accuser. I know that there is not a common intimacy and friendship between them;" upon which Sir Francis North, C. J., exclaims — "Do you challenge a jury-man because he is supposed to know something of the matter? For that reason the juries are culled from the neighborhood, because they should not be wholly strangers to the fact. If you can show that he hath already given his verdict by his discourse, and that you are already condemned in his opinion, that *may be some* cause of challenge; but not that he hath discoursed with neighbors as others do. It may be he believes it, and may be he does not believe it, he is now to give his verdict upon what he hears upon oath."

[*Reading.*] "My lord, I am very glad to see Sir John Cutler here, for I did intend to have his evidence for me." To which remark the judge returned — "That you may have, though he be sworn."— (7 *State Trials*, 267.)

Such a dialogue as the above could not be heard, according to the present construction of juries, without shocking all notions of legal propriety. If, then, by the allegation of the jury system being English, it is meant to defend it on the sentimental and antiquarian ground, that it has been hand

ed down to us in its present form, and therefore we are bound to retain it, and transmit it to posterity, then the assertion is valueless. Our idea of a jury is that of twelve impartial men, who independently of all extraneous information, are to decide on the facts brought before them in evidence. And this was what our ancestors' idea was *not*.

The jury has shifted its character and use. It was not what it is; and there is no valid reason why we should not, as our forefathers have done, review and modify its character and application to suits at law. The present inviolability should depend solely upon its present merits for the particular purposes of those who have now to appeal to the law for their protection and support. We know that we are warned to preserve great respect for posterity, as well as worship for our ancestry. It is indeed a difficult task to effect any reform, or remove any inconvenience which presses upon ourselves, because of these twofold and overwhelming obligations to our ancestors and our descendants. The embarrassments imposed by these considerations of the past and the future, involving equally the uncertainties of history and prophecy, make the duty of looking after our own generation particularly onerous.

We would by no means urge that we should sacrifice, either for ourselves or our descendants, the right to any constitutional privilege; but, without doing this, we may surely remove proved inconveniences to ourselves, which we daily feel, in the sure and perfect hope that our posterity will not be therefore powerless to abrogate what we hand down to them if they desire it, nor so unwise as not to perceive for themselves what is requisite for their welfare, without respect of our previous dealings. Every age, in fact, must legislate for itself.

We believe the supposed danger really pointed at by those who dread innovation in the practice of summoning juries to decide in civil cases, is that it will lead to like proceedings on criminal prosecutions, and that arbitrary governments will abuse a power which they may then seize. In a debate in the last session on the Indictable Offence (Metropolitan District) Bill, which related to an alteration of the laws relating to grand juries, Lord Lyndhurst took the opportunity of addressing himself to the class of arguments we are now adverting to. He said: —

"In the first place, I would suggest to your lordships that when any measure is brought forward, changing the fundamental laws of the country, particularly the important laws relating to trial by jury, you ought not to consider only the present state of things, but that which may hereafter arise, and you ought to proceed with the greatest circumspection and caution. At present we are not at all aware of what arbitrary government means; we now pursue the directly opposite system. Prosecutions for political offences are never heard of; the administration of justice is mild in the extreme; and we have no grounds of complaint whatever on any of the points I have referred to. We may be perfectly satisfied with our present position; but, unfortunately, I have lived in times of a different character. I have seen the time when the government was carried on upon arbitrary and even tyrannical principles — when political prosecutions were of constant occurrence, and were conducted with extreme harshness, and punishments of great severity were inflicted for political offences. I have been myself, to a certain extent, not merely a witness of but an actor in, those times. The growing prosperity of the country, producing a greater amount of content, has caused a change from the feelings that then prevailed: but, my lords, we must not so far delude ourselves as to suppose that such a state of things can never again arise. Violent political feelings may again be excited, and who can venture to say that a similar state of things may not again occur? At

all events, let us not, acting under such a delusion, take any steps towards destroying the bars and fences the constitution has given against the exercise of arbitrary power."

And, again, the noble lord urged, with respect to the particular measure then before the House, what may be said of any measure affecting an institution like that of juries: —

"It is harmless at the present moment, but will it always be harmless? It is our duty to provide against all contingencies, and not to suppose that the present harmony and the present smoothness of the government will always continue. Statesmen should look forward to contingencies of various kinds, to guard against them. Our ancestors guarded against them in the provisions to which I have referred."

Now, all we will affirm on this matter is, that there is no possible reason for abandoning trial by jury in any criminal case, least of all in political prosecutions, *because* we do not demand its invariable aid as a necessity in an intricate patent case, or on the issues of fact involved in various suits at common law. An over-sensibility to danger is in itself highly inconvenient; and it appears to us an absurd jealonsy to suppose that there is any conspiracy against the constitutional right of an Englishman being fairly tried by his peers, or an attempt to favor arbitrary power, in advocating a more extended right for litigants to have their causes tried by a judge, if it be believed that this is the most satisfactory mode of proceeding.

Whether the present jury system be theoretically absurd or thoroughly English, is of far less moment than the question, does it work so well that it cannot be modified with advantage, and, in certain classes of cases, be exchanged, as a general rule, for trial by judge? Will the advantage of having a skilled judge to adjudicate, be outweighed by the loss of publicity supposed to be incurred when the jury-box is not filled — and twelve honest men do not receive their first lesson in jurisprudence by seeing business done in court, and experimentalizing on the fortunes of the parties whose action is being tried before them? For, be it remembered, the inexperienced jurors do not, like students of medicine, practise first upon the dead subject, but may have the duty, on his first essay, of amputating a living suitor's character, or removing his purse to his opponent's pocket. Now, we would suggest that shorthand-writing, steam-printing, cheap and accurate reporting and publishing, to a great extent supply the absence of jurors. It was well for men to come together in former times to see and hear what was doing, for they not only furnish the *check* which juries afford over judges; but, locomotion being imperfect, and intercourse limited, except between near neighbors, the necessity which was imposed on yeomen coming together, insured an audience interested in the matter, who, on going home, were the means of distributing authentic information to divers districts, as to the uses and terrors of the law. Now, the public is kept informed of the proceedings in courts of law by a cheap press, and the "check" which public opinion exercises is thus put in full force.

There is a large class of causes which are usually said to be of "no interest to the public," arising out of contracts, &c., and depending on the particular value of certain evidence. But these, by general consent might be better tried by the judge alone. In other cases, that influence which audience and reporting are supposed to produce, would be yielded in abundance in the common course of modern affairs, through the medium of general and professional newspapers. It cannot be denied, as it seems to us, that the intervention of a jury might be most useful as a check, where the law does not now admit of it, on the ground of inconvenience. We refer to petty sessions holden before certain county magistrates, whose

ideas of responsibility would doubtless be much heightened by a knowledge that they were under the observation of a jury, whose concurrence, moreover, was essential.

In the superior courts, an intelligent profession, an independent bar, the reporter's box, and a court of appeal, operate as a very powerful public opinion, far more than twelve select men, who are for the most part instructed and led to their verdict by the judicial judge, whilst they free him from the responsibility of giving it himself.

Closely connected with this portion of the discussion is the assertion, that the judges are more respected, and their impartiality more trusted, when the losing party has only the jury's stupidity and corruption to complain of. People are afraid of the press taking to criticise the judges; of seeing Sunday newpapers placarding "*Justice A.'s iniquitous verdict*," or "*Baron B. at his blunders again*," and the like. But constituted as the bench is now, when even party politics are made subordinate to personal fitness for promotion to the bench, there is no probability of such scurrility being attempted. We do not find judicial decisions on points of law (when the success or failure of an action turn thereon) provoke such intemperate remarks: nor in those courts which we have already enumerated, where no jury is engaged, do we find these threatened consequences ensue. No doubt any judge is liable to the imputation of partiality; but if it be not founded in fact, the idle rumor of the day does no harm, and need not be dreaded. If we should do more substantial justice by substituting one tribunal for another, the public would, notwithstanding occasional grumbles, be better satisfied, and genuine contentment with legal institutions would be increased. Lord Mansfield was subjected at one time to like suspicion, and Bentham has a characteristic note in one of his essays on this subject. He says: — "I remember hearing partialities, and even the habit of partiality, imputed by many to Lord Mansfield. I cannot take upon me to say with what truth; partly by situation, partly by disposition exposed to party enmity, so he accordingly was to calumny. 'Lord Mansfield' (said his everlasting rival and adversary, Lord Camden, once) — 'Lord Mansfield has a way of saying, It is a rule with me — an inviolable rule — never to hear a syllable said out of court about any cause that either is, or is in the smallest degree likely to come, before me.' 'Now I, for *my* part,' observed Lord Camden — I could hear as many people as choose to talk *to me* about their causes; it would never make any the slightest impression upon me.' . . . . Such was the anecdote whispered to me (Lord Camden himself at no great distance), by a noble friend of his, by whom I was bid to receive it as conclusive evidence of heroic purity. In the days of chivalry, when it happened to the knight and his princess to find themselves *tête-à-tête* upon their travels, and the place of repose offered but one bed, a *drawn sword* placed in a proper direction, sufficed to preserve whatever was proper to be preserved. This was in the days of yore, when pigs were swine, and so forth. In *these* degenerate days the security afforded by a *brick wall* would, in the minds of the censorius multitude, be apt to command more confidence." The reputations of Lord Mansfield and Lord Camden have survived such suspicion suggested against them; and with an independent bar and the public press as checks, there is little fear of the bench degenerating, or losing its lofty character.

The probabilities are, that judges are not, nor would be swayed by class prejudices, like those referred to above, as now obstructing the administration of justice through juries; yet it is sometimes said that the substitution of judges for juries would be attended with this sad consequence — that the former would administer the law *strictly*, while the latter often do

rough justice by wresting its course. It is actually thought advantageous that they should shut their eyes to the truth, and open their mouths to falsehood, lest the law of which they do not approve should be enforced, or lest it should be applied in an individual case where they consider it would work hardship. They therefore agree to do "a great right by doing a little wrong." We are all familiar with the doctrine being professed by those who are opposed to capital punishment, and regard on religious and moral grounds the perjury of a juror as a lighter offence than his being instrumental in depriving a human being of life. This we must, however, hold as monstrous in morals, and pernicious in practice. If the law is bad in any particular, let it be amended; but to prevent its application by a system of perjury — excused under the term of doing rough justice — is disgraceful to a civilized country, and destructive to the integrity of those concerned in the administration of justice.

When one sees a sharp unscrupulous rogue employing the law as an engine of extortion, or using it as a cunningly devised means for enriching himself at the expense of the ignorant, unsuspicious, and innocent, one rejoices to see him frustrated in his object; but not if it is at the cost of a jury of twelve good men and true conspiring to commit perjury. Another point to be recollected is, that often what may have the appearance of hardship and cruelty (and is therefore endeavored to be thus remedied by a corrupt verdict), might nevertheless, on full investigation, be held to be both legally and morally just and fair. The equitable powers of the judges at common law ought, doubtless, to be much enlarged in order to afford protection to those against whom the law may be strained; and in those particulars where the law itself requires modification or restriction, these should be applied, instead of attempting a cure by the arbitrary infringement of the law. The same remark applies to another observation which is sometimes advanced in favor of the healthy action of juries on litigation; namely, that mean and dirty claims — but good in law — are often kept out of court from fear that indignant juries would reject them. It is a matter of every day's experience that juries, however they may be assured that to award and proportion damages with reference to costs, is improper, insist upon taking this matter into their consideration, and not unfrequently thereby produce injustice. Much better would it be if the power of ordering costs in any event should be left with the legal tribunal before which the cause is tried; but it would be very doubtful if it should ever be left in the hands of the jury.

It should not be forgotten, that, after all, trial by jury is trial by *judge and jury* — that if you were to pick up twelve men, who, without the assistance of a judge, were called on to try causes, the system would be a ludicrous farce. The judge not only acts as moderator during the trial, but gives his version of the evidence, and directs a verdict more or less strongly, according to the habit of the judge, or as the nature of the case may require; and if the statement, that the habitual exercise of deciding on disputed facts unfits a man's mind for determining matters of fact, be of any validity, then so far as an experienced judge exerts control over the verdict of juries, to that extent will his interference be mischievous. But we apprehend the most superstitious jury-worshipper would not desire to dispense with the aid of the judge. In point of fact, the habit of sifting testimony, and attaching the proper value to the various phenomena of evidence, does *not* unfit either judge or counsel for forensic duties. If this doctrine indeed were sound, then a jury should not be constituted of tradesmen who have *some* knowledge of life and experience of human veracity, but collected from the ignorance of Sunday-schools and the in-

nocence of nunneries. A judge is surely not rendered incapable by that which forms, according to the advocate of the jury system, the very essence of a juryman's excellence, — a practical acquaintance with men and life. There is no doubt but that a judge may be crotchety and wrongheaded, may be addicted to special theories, and invent invariable, or misapply general rules for solving particular difficulties. But, on the other hand, no one is so likely to be made aware, and, if possible, be cured, of a tendency to such bad habits as the judge; first, in his professional career when at the bar, and even when elevated to the bench, by his having continually his opinions and views subjected to the canvassing and opposition of counsel, the consideration of his colleagues, and the revision of superior courts.

The division of the judicial office between judges and juries, although theoretically clearly enough defined, is practically often lost sight of. Mr. Amos has referred to the inscription on the medal, struck upon the occasion of the acquittal of Lilborne when prosecuted by Oliver Cromwell. "John Lilborne, saved by the power of the Lord and the integrity of his jury, who are judges of law as well as of fact;" or, as the same truth has been expressed in the oft-quoted lines:—

> "For Sir Philip well knows
> That his inuendos
> Will serve him no longer in verse or in prose;
> Since twelve honest men have decided the cause,
> Who are judges of Fact *and judges of Laws.*"

And so long as juries have the power of overstepping the limits of their duties, they will do so — especially when the addresses of counsel appeal to their vanity and prejudices; and the warnings of the judge only excite their jealousy of his and the law's interference with their right divine to answer wrong.

The opportunity which trial by jury affords for "summing up" is practically its best feature, and the advantage here is to the judge himself; for indeed every day's experience shows that nothing elucidates facts and tends to lead one to a just conclusion, so much as explaining to others the grounds, and expressing in words the reasons, which have conducted thereto. By this means, moreover, if any misapprehension has arisen, it may be corrected, and the source of error and confusion be traced. But, even in the absence of a jury, a judge would accompany his verdict with his reasons in the form of summing up. There need be but little change in this respect. As a general rule, he is found to be the best judge who is best able to sum up in the clearest manner, and so to leave a case to the jury, that their verdict shall be simply the expression of the necessary inferences, astutely indicated by the bench. It would then follow that the judge who can sum up powerfully to a jury, could explain his own verdict without their presence. We view with very little veneration the jealousy affected in some quarters, of the judge trenching upon the functions of the jury. In almost every case where the latter repudiates the judicial opinion, they are giving a verdict either obviously perverse, or probably erroneous; the rare exceptions being, when the judge being by accident under an abnormal and false impression, to which all are occasionally liable, meets with an ordinarily obstinate or remarkably intelligent jury, by which his judgment is corrected.

The arguments founded on the social use of the jury, which heretofore has unquestionably been of great importance to the country, are those to which the advocates for retaining the tribunal in its present state had better adhere, although, as we have pointed out, they apply less strongly now than they did at an earlier period.

The most perfect administration of justice between man and man, and the strong confidence of the public in the justice of our tribunals, stand beyond all other social benefits, and should be purchased even by the sacrifice of those social advantages, however great, arising from men meeting together for the common purpose of aiding in the administration of justice. Unless, indeed, the *main* object of any machinery be effected in the best and most perfect manner, the ingenuity exhibited in construction, and the collateral merits of the machinery itself, will by no means justify its employment. The main object of legal tribunals is the production of justice. Other social and political advantages are but collateral.

The political uses of the institution are admitted to be undeniably great. Juries have often stood between a tyrannical government and its hated victims. They have also, and this, too, in later times, protected miscreants, who have been saved from the penalty due to their proved guilt, by confounding the guilt of cowardly assassination with the virtue of patriotism, and mistaking the rant and fustian of a vulgar speech for the defence, for the outburst of genuine oratory and real eloquence engaged in the cause of freedom. Nevertheless, the security and confidence which the right to trial by jury give to the subject are too great to be sacrificed.

The right to trial by jury we would maintain, therefore, both in criminal and civil causes. But, practically, in the latter we believe its employment should be (as in the county courts) the exception, and not the rule. If the law was amended by an enactment (as, indeed, was proposed many years since), that "all questions of fact in civil suits should be determined by the judge, unless either party shall require them to be determined by a jury," thus inverting the present order of choice existing in the procedure of the supreme courts, a large class of cases would fall naturally and properly to the judge, to the immense saving of public time and trouble. Such tribunal would of course be opposed by a few of the older *Nisi Prius* advocates, the level of whose power is that of the common jury, and some little prejudice would be felt at first.

There ought to be a fee attached to the summoning of a jury, each member of which ought to receive, as do the members of a special jury, a proper fee for their attendance. Such fee ought not to amount to a barrier in resorting to a jury, but should be a consideration. It is said the cost of a special jury is about twenty guineas (which is too high). That of a common jury should be, we would suggest, about one-third or one-fourth of this sum. There should be also a much larger admixture of the class whence special jurors are drawn with the common jurors — perhaps not less than one-fourth of the former should be mingled with the latter.

Again, the granting of trial by jury should not be a matter of course. It should be by rule, open to opposition by the other side, to be granted at the discretion of the court or judge, and the cost of summoning juries should be also made discretionary. The new system thus introduced would, we believe, work well; and the greater number of cases would be appropriately adjudicated on by the judge.

We are, in fine, inclined strongly to concur with Mr. Brown when he says: —

"Let all ordinary cases be heard by a man of superior discernment and practised skill, whose natural powers have been sharpened by a life spent in forensic contests; who cannot be easily deceived by a witness, because he is conversant with every kind of testimony, nor by an advocate, because he has been an advocate himself; who is fit to hear, and to estimate at its true value, every species of evidence hitherto excluded, which may

open an avenue to the truth; whose attention is not to be exhausted by the length, nor his comprehension distracted by the complexity, of the evidence: give the suitor, I say, a man with these qualities, who performs his functions under the public eye, and who is in no hurry to get away to his shop or his farm; whose very trade and business it is to weigh, investigate, and decide on questions of doubt and difficulty; in a word, let the facts be decided by the same experienced judges as the law, and the whole body of the law will feel renewed and invigorated by the change. A great part of its supposed uncertainty will vanish, new light will pour in from sources of evidence now shut up, the scales of justice will be held with even hands, the heavy grievance of new trials will be vastly diminished, the suitor will obtain his rights with greater speed, economy, and certainty, and the criminal will no longer find refuge in the sophistry of counsel, or the weakness of juries."

Where we differ from Mr. Brown in the above forcible passage we have already attempted to show; but we are much mistaken if the general truth of his views are not growing to be those of the most intelligent of the profession and the public.

ELWELL ON MALPRACTICE AND MEDICAL EVIDENCE.

This work is announced as nearly ready. It is by J. J. Elwell, who is one of the professors in the Ohio State and Union Law College, and one of the editors of a new magazine, called The Western Law Monthly. Its author has had practical experience in both the professions whose interests are touched upon in this woak, having practised medicine for ten years before he donned the long robe. We shall look for his work with much interest. It is to be published by Mr. Voorhies, in New York, and is to resemble, in style, type, and paper, "Drake on Attachments." We hope it will resemble that work in some other respects.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. By GEO. G. FOGG. Vol. 35 pp. 618; vol. 36, pp. 616. Concord: G. Parker Lyon, 1859.

These are the fourth and fifth volumes of Mr. Fogg's series of the New Hampshire reports and they include the cases decided at the July term, 1858, a fact which shows a very considerable degree of dispatch on the part of editor and publisher. The cases are thoroughly and well reported with full abstracts of the arguments of counsel, and the head notes are clear and full. The decisions themselves are excellent in matter and manner, and will repay a diligent perusal; the points decided being often novel and interesting.

We are sorry to hear it rumored that the solid attractions of the bar are likely to cause a change in the composition of the Supreme Court of New Hampshire, for a good judge is better for the public service than an equally good successor.

A TREATISE ON THE LAW OF MERCANTILE GUARANTIES, AND OF PRINCIPAL AND SURETY IN GENERAL. By WALTER WILLIAM FELL, ESQ., of the Middle Temple, Barrister at Law. Second American, from the second and last English edition, with Notes and References to American Decisions. By JOSEPH WILLIAM ALLEN. Burlington: C. Goodrich & Co. 1859.

We have here a reprint of Mr. Fell's excellent treatise upon Mercantile Guaranties, a book of high credit with the profession, both in this country and in England. The references to American decisions are quite exten-

sive, occupying a considerable proportion of the volume, but not more than was desirable. The American cases upon the subject have become numerous, and are quite as important to American lawyers as are the English cases. We think the publishers have performed a very acceptable service to the profession in bringing out a second American edition of this valuable book, so thoroughly remodelled. The work in its mechanical execution is highly creditable, and we doubt not will meet a ready sale.

REPORTS OF CASES argued and determined in the Courts of Exchequer and Exchequer Chamber. Vol. III. By HURLSTURE & NORMAN. With additional cases decided during the same period, selected from the contemporaneous reports. With references to cases in the American Reports. HENRY WHARTON, ESQ., Editor. Philadelphia: T. & J. W. Johuson & Co. 1859. pp. 1012.

Another volume of the prompt, cheap and valuable reprint of the authoritative English reports. We repeat that the Philadelphia edition of the Common Law Reports of England is now the only American edition, and we advise all our readers to buy it. We intend to buy a complete set of the Exchequer Reports of this series as soon as all the subscribers to the Law Reporter have paid up.

OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, chiefly concerning the Colonies, Fisheries and Commerce of Great Britain. Collected and digested from the originals in the Board of Trade, and other depositories. By GEORGE CHALMERS, ESQ., F.R.S., S.A. Burlington: C. Goodrich & Co. 1858.

Here is a well printed book of nearly 800 pages, upon good paper and new type, and containing a large amount of valuable matter for American statesmen, not elsewhere accessible, the former edition having been long out of print. The book begins with a biographical sketch of the authors, more than sixty in number, embracing six lord chancellors, eleven chief justices of England (and Mansfield among the number), lord chief barons, attorney and solicitor generals, bishops, doctors of civil law, and others, not one of whom is unknown to fame. Such a collection upon such a subject must be invaluable to those who desire to thoroughly master these subjects, and they are every day becoming more important to be correctly understood. We should not expect such a book to find at once a very extensive sale, but the edition will be sure to be called for in time. It only requires to be known.

SPEECH OF JOHN W. ASHMEAD in the case of The People *v.* James Stephens, indicted for murder in the Court of Oyer and Terminer for the City and County of New York, delivered March 25, 1859.

This able argument of ninety pages, octavo, spoken in a cause of great public interest, reflects much credit on the eloquent counsel, and well deserves to take a permanent place with the standard spoken literature of the bar. The case was of great complexity and the exertions of the counsel on both sides were very great. The verdict was against the the prisoner, and the case is now, we believe, before the Court of Appeals upon important questions of law.

INTELLIGENCE AND MISCELLANY.

JUDICIAL QUALIFICATIONS. — MR. JUSTICE BLACKBURN. — It has often been said that Lord Campbell is not fond of opposing public opinion; that he loves rather to meet it half-way; that he has little of that courage, the most rare and the most necessary quality in modern public men, which can brave the assaults of newspapers, and quietly outlive a popular outcry. Or rather it is, perhaps, meant, not so much that he wants courage, as that he has himself a certain sympathy with clap-trap, that he really does not rise absolutely superior to "the British Lion," "the Protestant Religion," "he that lays his hand upon a woman except in the way of kindness," etc. We have heard it stated, that though he is an upright and painstaking judge, yet that it would be better to be tried by some one else if a very great many people very much wished us to be hanged, and said so in a very great many newspapers. He would give us fair play, it is said, yet in his inmost soul he would think all those people ought to be gratified.

Be this as it may, it is not now our business to criticise the Lord Chancellor as a judge. He has at least shown himself courageous in his first important exercise of the high functions which have been newly entrusted to him. We congratulate him on his selection of a judge to fill the vacant seat in the Queen's Bench. He must have known that he should excite the bitter wrath of many disappointed claimants, and that they would have it in their power to give some plausible force to their censure. Mr. Blackburn was a man unknown to fame. He was not great with a jury. No attorney would have chosen him to conduct a cause which required a large person, cunning advocacy, and humorous or ferocious eloquence. His circuit knew little of him. But there were places where he was known. Though he had a large and increasing practice of the most important and valuable kind in the city of London, he was better known to judges than to juries.

Many a man who blazes a provincial star every spring and autumn wanes sadly in the interval. The country attorneys fight for him, the witnesses tremble before him, he is a most difficult animal for my Lords the Queen's Justices to drive; but in a higher legal atmosphere, where grasp of intellect, breadth of view, and subtlety of logic are required, he fades into silence, and sets dumb all term time. The arguments *in banco* are the true conditions under which to take the measure of a man as a lawyer.

Now we venture to say of the present Mr. Justice Blackburn, that in a difficult argument before the full court he deservedly commanded the highest respect of every judge, and his services were eagerly sought for. Few men have shown themselves better capable of handling with precision and accuracy the complex web of English jurisprudence. He is not only a profound but a systematic lawyer. If anything, perhaps too much so; a little too hard and Scotch in his argument. An English judge, to be perfect, requires a very rare combination of powers, a command over princi-

ples which shall prevent our law degenerating into a confused mass of isolated and arbitrary sequences, and a foresight and caution which shall prevent him from tying it up beforehand, and thus depriving it of one of its very highest excellencies, its elasticity and power of covering the ever new cases which arise. Perhaps the newly appointed judge has rather more of the former than the latter power; but his mind is well balanced and sensible; — and though the Lord Chancellor may have disappointed the Profession, we do not think it was in his power to have selected a more solid, capable and conscientious judge.

It is true that if you can find a man who, to profound legal knowledge and that sort of capacity which can take a clear view of intricate legal questions, adds the sort of experience which can only be obtained by the habit of leading at the bar, he will make a better judge than one who has always practised in a stuffed gown; at any rate, a better Nisi Prius judge. But the combination is most rare, and if we must choose between the two we should all of us like to have our causes decided by a lawyer rather than an advocate, however eloquent.—*Economist.*

Evidence In Equity.—The Queen has appointed a separate commission to inquire into the mode of taking evidence in Chancery.

The Evidence Commissioners are the Lord Chancellor, Lords Lyndhurst, Cranworth, Wensleydale, Chelmsford, Kingsdown, the Master of the Rolls, the Lords Justices, Sir W. Page Wood, the Attorney-General, Sir Hugh M. Cairns, G. M. Gaffard, Esq., Q. C. W. Strickland Cookson, Esq. and G. Tallentine Gibson Esq.

A witty writer (*Thoughts on Legal Discontent in relation to Evidence in Courts of Equity*) thus described the present state of things:—

It is a case of shipwreck, the state of which has no law, Justice is not done. When we want a witness at all, we want to rub him against the grain, like a black cat in the dark, to bring out the sparks. I mean to examine him thoroughly, and let the judge see for himself the shape and color of the lie, if there be one. The witness before the examiner is the conjuror's wonderful bottle — a thing as old as the Pyramids; we can have driblets of anything we like out of it for the asking. . . . A clever witness — that such a thing should be! — has ever something of the lapwing, taking short discursive flights, to beguile us away from the nest of veracity; but before the examiner, he is either an automaton much out of order, or a bubbly Jock, all accent and gibberish, or a deliberate rogue, who glorifies his case at pleasure, and shapes it into form and likelihood between the pauses occasioned by the extensive taking down. We can never catch him; he has a vague notion that we like fencing, and are indeed but the converse of himself. He has almost told a lie, or, what is the same thing, let out the truth, and before the next question can be put, tones himself up or down again as the case may be, like a royal academican after hanging, reasons, calculates, qualifies, and the truth or lie is once more gone. The judge, who would easily have seen through all this, is away, and in due time receives it all as so much gospel, and is bound by his office to go mad, that is to say, to reason as rightly as he can on false premises.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1859.	Returned by
Alden, Isaac F.	Bridgewater,	July 10,	William H. Wood.
Billings, James	Canton,	Aug. 10,	J. H. Cobb, Register.
Bowler, George	Charlestown,	" 23,	Wm. A. Richardson.
Bullock, Dwight,	Greenfield,	" 15,	Charles Mattoon.
Buzzell, Oliver A.	Lowell,	" 11,	Wm. A. Richardson.
Cleaves, Charles	Boston,	" 1,	Isaac Ames.
Coggeshall, Fred'k P. (1)	"	" 18,	"
Cooley, Benjamin F.	Brookfield,	" 29,	Henry Chapin.
Cox, Peter L. (2)	Boston,	" 10,	Isaac Ames.
Crowell, James E.	Chelsea,	" 10,	"
Davis, Adolphus	West Cambridge,	" 8,	Wm. A. Richardson.
Dexter, Amasa	Newton,	" 29,	" "
Ellcott, Gustavus	Worcester,	" 22,	Henry Chapin.
Felch, Isaac Felch, Isaac K. (3)	Natick,	" 23,	Wm. A. Richardson.
Forbush, Rufus N.	Boston,	" 31,	Isaac Ames.
Gifford, George G.	New Bedford,	" 25,	Edmund H. Bennett.
Gould, Lawson	Charlton,	" 11,	Henry Chapin,
Hafford, Benjamin (4)	New Bedford,	July 14,	Edmund H. Bennett.
Harlow, Alonzo H.	Boston,	Aug. 16,	Isaac Ames.
Howard, Frank Howard, Nathan (5)	Easton,	" 1,	Edmund H. Bennett.
Howland, John W.	Pittsfield,	" 27,	James T. Robinson.
Hurley, John (6)	Cambridge,	" 15,	Wm. A. Richardson.
Ide, Timothy J.	Milford,	" 31,	Henry Chapin.
Ingersoll, Wm. H. (4)	New Bedford,	July 14,	Edmund H. Bennett.
Kingman, Benjamin S.	Bridgewater,	" 29,	William H. Wood.
Libby, Elias O. (1)	Roxbury,	Aug. 18,	Isaac Ames.
Low, Hovey P. (6)	Cambridge,	" 15,	Wm. A. Richardson.
Macoy & Booth (7)	Pittsfield,	" 4,	James T. Robinson,
Mayo, Lorenzo (2)	Boston,	" 10,	Isaac Ames.
Mellville, John	"	" 22,	"
Mendell, Ellis	Fairhaven,	" 9,	Edmund H. Bennett.
Myers, Jacob	Late of Worcester,	" 22,	Henry Chapin.
Nims, Henry C.	Boston,	" 15,	Isaac Ames.
O'Connell, John	Lee,	July 13,	James T. Robinson.
Perkins, Isaac	Bridgewater,	" 5,	William H. Wood.
Richardson, Nathaniel A.	Winchester,	Aug. 25,	Wm. A. Richardson.
Rogers, James E.	Chelsea,	" 1,	Isaac Ames.
Rooney, William	Charlestown,	" 27,	Wm. A. Richardson.
Runnels, Hiram C.	Waltham,	" 20,	" "
Shiepser, Isadore	Boston,	" 3,	Isaac Ames.
Small, Josiah S.	Charlestown,	" 12,	Wm. A Richardson.
Smith, James B.	Boston.	" 22,	Isaac Ames.
Stearns, James W.	Somerville,	" 27,	Wm. A. Richardson.
Turner, James H.	Fairhaven,	" 30,	Edmund H. Bennett.
Washburne, Alex. H.	Kingston,	July 8,	William H. Wood,
Wellington, William R.	West Roxbury,	Aug. 3,	J. H. Cobb, Register.
Wheeler, A. B.	North Bridgewater,	July 4,	William H. Wood.
Whittier, Luther S.	West Roxbury,	Aug. 4,	J. H. Cobb, Register.
Wilbur, Alex. F. (5)	Easton,	" 1,	Edmund H. Bennett.

FIRMS.

(1) E. O. Libby & Co.
(2) Mayo & Cox.
(3) Isaac Felch & Son.
(4) Benjamin Hafford & Co.
(5) Frank Howard & Co.
(6) Late firm of H. P. Low & Co.
(7) Macoy & Booth.
Individual names not stated.